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CASES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 68

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

STATEMENT

The Pennsylvania Railroad, Western Maryland Railway, and Maryland & Pennsylvania Railroad all serve the City of York, Pa., which has approximately 50,000 inhabitants (Tr. 15).

The Pennsylvania traverses York from north to south between Harrisburg and Baltimore, and from east to west between Frederick, Md., and Lancaster, Pa. In passing the freight station at York the two lines use the same tracks (Tr. 16).

The Western Maryland serves York with a branch from Porters, Pa., which enters into only that por-

tion of York located in the northwest angle formed by the Pennsylvania's intersecting lines. The terminals of the Western Maryland are a short distance north of the Pennsylvania's freight station located at the junction of its two lines (Tr. 16).

Beginning at its eastern terminal in York and continuing westward, the line of the Western Maryland approaches the east and west line of the Pennsylvania until Codorus Creek is reached, where the rights of way are adjacent. Continuing further westward the lines of the Pennsylvania and the Western Maryland parallel each other for one and two-thirds miles to a point where they diverge. They reconverge at Hanover (Tr. 16).

The Maryland & Pennsylvania extends from Baltimore and connects with the Pennsylvania in the eastern portion of York (Tr. 16). When the Western Maryland (through its predecessor) entered York in 1893 (Tr. 17), the Pennsylvania was firmly established there. The right of way selected by the Western Maryland being adjacent to the right of way of the Pennsylvania (successor to Hanover & York Railroad) it crossed the plant tracks of various industries north of the Pennsylvania and severed them from it. The Western Maryland (through its predecessor) entered into contracts with these industries and agreed to preserve their ability to receive and deliver freight *via* the Pennsylvania (successor to Hanover & York) (Tr. 17). These two companies further agreed that for the mutual benefit of them and the residents of York, each line would receive

from and deliver to the other at the nearest convenient point of connection loaded and empty cars for the purpose of delivering or receiving traffic to and from points in York accessible to one carrier but not to the other, the charge for the service not to exceed the actual cost thereof. The agreement described the territory as west of Beaver Street where the Hanover & York (predecessor of the Pennsylvania) connected with the present main line of the Pennsylvania (Tr. 17).

In lieu of the method provided in the contract, each carrier has long operated with its own engines over short switch tracks to the tracks of the other, and thence over these tracks to the sidings where deliveries are made to the various industries. In practice, receipt and delivery of traffic is now limited to industries located between Codorus Creek and West Market Street (Tr. 17).[1]

There are about 300 industries of various kinds located at York. Over 100 have spur tracks connecting with one or more carriers. Of the 17 industries within the agreement zone, 8 connect with the Western Maryland, 7 with the Pennsylvania, and 2 with both (Tr. 18). Both east and west of the zone, where the lines diverge, are 8 industries with tracks

[1] On the blue print exhibit attached to the original petition the following industries are located within this restricted zone: York Mfg. Company, York Gas Company, Henry Lucking, York Brewing Company, Strayer Brothers & Company, H. H. Smyser, York Cut Stone Company, J. C. Grove & Son, York Fair Grounds, Pullman Vent & Mfg. Co., S. Morgan Smith Co., Zinn Brothers, I. Unterburg & Co., York Body Corp., York Wall Paper Co., Gilbert Wall Paper Co., York Card & Paper Co.

leading to both the Pennsylvania and Western Maryland; 46 are on the Pennsylvania only; 27 on the Maryland & Pennsylvania only; and 5 on the Western Maryland only (Tr. 18).[2]

Under their agreement the carriers accorded the 17 industries within the zone all advantages which would accrue to them if there were interchange at York with mutual absorption of switching charges. The disadvantages of industries within York located outside of the restricted zone were disclosed in detail in the record (Tr. 18). For instance, the York Body Corporation and the Martin-Parry Corporation, competing manufacturers of automobile bodies, are located on the Western Maryland, the former approximately in the center of the zone and the latter one mile west of its competitor's plant and about 500 yards outside of the zone. Traffic to and from the plant of the York Body Corporation is handled by the Pennsylvania at the York rate, as if the industry were connected with its rails (Tr. 18). If a car con-

[2] Although the tracks continue side by side for some distance west of West Market Street, such industries are construed to be beyond the agreement. If an industry with track connections with the Western Maryland within the zone wishes to forward a car via the Pennsylvania lines, the Pennsylvania furnishes the car, issues the bill of lading, and moves the shipment. If a car is delivered by the Western Maryland to an industry upon the Pennsylvania lines within the zone, the Western Maryland collects the freight and demurrage charges. Neither line pays per diem charges or keeps any record of cars handled to or from industries on its lines by the other carrier. Each carrier has in the past refused to extend the arrangement to include industries without the zone, or to handle in any manner, except via Hanover or other junction points, traffic on which the other carrier has received the line haul. The Western Maryland has expressed a willingness to handle such traffic at York in the future on a reciprocal basis (Tr. 17).

signed to its competitor arrives in York *via* the Pennsylvania, the consignee must either dray the contents to the plant or have it reshipped to Hanover *via* the Pennslyvania and back *via* the Western Maryland, a total distance of 39 miles. From York to York, *via* Hanover, the sixth-class rate of 11 cents per 100 pounds is applicable on most of the traffic, or in excess of $30 per car. To minimize its disadvantages, Martin-Parry Corporation has constructed a siding connected with the Pennsylvania and trucks its freight to and from its plant when it utilizes the Pennsylvania's rails at York. The cost of the drayage alone is $13,000 per annum (Tr. 18). Other industries on both the Western Maryland and Pennsylvania are in the same situation as the Martin-Parry Corporation with the added disadvantage of being required to dray a greater distance to and from the public team tracks (Tr. 18).

Where shippers on the Western Maryland and the Pennsylvania without the zone do not dray, they are practically in the same position as if located on these lines in cities 39 miles apart (Tr. 19).

On complaint of the Manufacturers Association the Commission found that the practice of the Pennsylvania and the Western Maryland of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within the zone and of according to them the benefit in service and rates of location upon both lines, while contemporaneously refusing to extend the use of their tracks for the purpose of delivering or receiving

freight at other industries similarly located within York, but without the zone, or otherwise to accord to shippers without the zone the benefit of service and rates of both lines, is unduly preferential of shippers within the zone and subjects shippers on their lines without the zone to undue prejudice and disadvantage (Tr. 24).

The Pennsylvania then filed the petition (Tr. 1). The motion of the United States to dismiss was overruled and a preliminary injunction was granted. On final hearing (Circuit Judge Davis and District Judge Gibson concurring (Tr. 30), District Judge Witmer dissenting (Tr. 34), the order of the Commission was annulled and permanently enjoined (Tr. 37) (*Pennsylvania Railroad* v. *United States*, 295 Fed. Rep. 523).

ARGUMENT

I

THE OPINION AND DECREE OF THE DISTRICT COURT IS A CLEAR SUBSTITUTION FOR THE REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION ON THE FINDING OF THE LATTER THAT UNDUE PREJUDICE RESULTED FROM THE PRACTICES OF THE PENNSYLVANIA AND WESTERN MARYLAND COMPANIES AT YORK

Section 3 of the Interstate Commerce Act provides (24 Stat. 379, 380, Ch. 104):

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any

particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15 of the Interstate Commerce Act (as amended by Section 418 of the Transportation Act 1920) provides (41 Stat. 456, 484, Ch. 91):

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or the rates, fares, or charges, to be thereafter observed in such

case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Instead of carrying out and discharging the terms and conditiόns of their written agreement to perform reciprocal switching on the basis of cost in a restricted artificial zone, a form of discrimination condemned in *New Castle Switching Case*, 236 U. S. 351, and the *Louisville & Nashville Case*, 238 U. S. 1, 18, 19, the Pennsylvania and Western Maryland railroads allowed the engines of each other to pass over the tracks and sidings of each other for the purpose of serving 17 preferred industries on the basis of the York rate, as against a refusal to carry out that practice or any other practice having like effect, for the remaining 283 industries which must pay the rate to Hanover

and back, usually sixth class, and amounting in many instances to as much as $30 per car.

The *Nashville Terminals Case*, 242 U. S. 60, 73, obviously will not save the appellee from a reversal of the decree. There the Nashville, Chattanooga & St. Louis and Louisville & Nashville (who owned 71 per cent of the capital stock of the former) held the terminals as "joint property in substance and the whole is held and used as one concern." Mr. Justice Holmes clearly states the situation thus (italics ours):

> The fact principally relied upon to uphold the order of the Commission is that instead of each road doing its own switching over the terminals used in common they switch jointly, and it is said that therefore each is doing for the other a service that it can not refuse to a third. We can not believe that the rights of *their own terminals* reserved by the law are to be defeated by such a distinction. We take it that a several use by the roads for this purpose would open no door to a third road. If the title were strictly joint throughout in the two roads, we can see no ground for prejudice in the adoption of the more economical method of a single agency for both, each paying substantially as it would if it did its own work alone. But, as we have indicated, a large part of the terminals is *joint property in substance and the whole is held and used as one concern.* What is done seems to us not reciprocal switching but the use of a *joint terminal in the natural and practical way.* It is objected that upon this view a way is opened to get

> beyond the reach of the statute and the Commission. But the very meaning of a line in the law is that right and wrong touch each other and that anyone may get as close to the line as he can if he keeps on the right side. And further, the distinction seems pretty plain between a *bona fide joint ownership or arrangement so nearly approaching joint ownership as this*, and the grant of facilities for the interchange of traffic that should be extended to others on equal terms. *The joint outlay of the two roads has produced much more than a switching arrangement, it has produced a common and peculiar interest in the station and tracks even when the latter are not jointly owned.*

In the instant case no joint ownership or operation of terminals is proved or even pretended. Exactly the reverse is true. Originally the arrangement was a mere agreement to switch for each other precisely as in the *New Castle Switching Case*, except that in the latter case each of the companies charged the other a fixed switching charge instead of the cost of the service. In practice they have discharged their agreement by each merely unlocking its switches to the engines and cars of the other. Instead of interchanging, they allow the use of their switches to each other in receiving and delivering cars from and to the 17 industries in the restricted artificial zone on the basis of the York rate to shippers.

As in the *New Castle Switching Case*, "there is no question as to the terms which the Commission might prescribe or the compensation which the Pennsyl-

vania Company ought to receive for the service to be rendered." In the *New Castle Switching Case* the cars transported over the Buffalo, Rochester & Pittsburgh road were brought to a physical connection with the Pennsylvania road at a point where it received carloads of freight from other roads and transported them over its connecting terminals to points of destination, and at that point, in like manner, forwarded over other railroads carloads of freight transported in interstate commerce and destined to points on such other connecting railroads (236 U. S. 363).

Holding that the refusal of the Pennsylvania to receive and switch cars of the Rochester road at the point of interchange on the same basis as the Pennsylvania received and switched cars received from other roads was undue prejudice under Section 3, this Court said (236 U. S. 361, 365, 366, 368, 369, 371, 372):

> This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law but of fact. *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144, 170. If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by

testimony, it can not be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission. *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R.*, 220 U. S. 235, 251; *Los Angeles Switching Case*, 234 U. S. 294, 311; *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 359.

* * * * *

The objection that the railroad is required to give up the use of its terminals to another company is perhaps the principal contention of the Pennsylvania Company and is based upon the last clause of the second paragraph of § 3, which provides that the section shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

As we have heretofore shown, the Act as it now is provides that transportation which must be furnished to all upon equal terms includes the delivery of freight as part of its transportation. While § 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective in accordance with the intention of Congress.

* * * * *

In the present case we think there is no requirement in the order of the Commission amounting to a compulsory taking of the use of the terminals of the Pennsylvania Company by another road within the inhibition of this

clause of § 3. The order gives the Rochester road no right to run its cars over the terminals of the Pennsylvania Company or to use or occupy its stations or depots for purposes of its own. There is no requirement that the Rochester Company be permitted to store its cars in the yards of the Pennsylvania Company or to make use of its freight houses or other facilities; but simply that the Pennsylvania Company receive and transport the cars of the Rochester Company over its terminals at New Castle in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania Railroad at the same point.

* * * * *

So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation and that the District Court was right in so determining.

In *Grand Trunk Railway* v. *Michigan Railroad Commission*, 231 U. S. 457, the question was whether certain railroad companies shall receive cars from another carrier at the junction point or physical connection with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits and be required to haul such cars in either of the above-named movements or between industrial sidings (231 U. S. 464). In sustaining the statute of the State of Michigan and the order entered by the Railroad Commission thereunder, this Court said (231 U. S. 468):

> The extent of Detroit is about 22 miles, and its population about 500,000. The effect of the order is simply that the companies shall accept freight at the designated points for shipment to the other designated points. This, except in an extreme sense, is not a use of the tracks and terminals; or, rather, it is only a proper use—the use for which the roads were constituted to afford. An area of 22 miles is attempted by appellants to be localized and made a destination point. A city may, in a sense, be such a terminal unit, but considering the extent of Detroit, it is competent, we think, for the State under the conditions which this record presents to consider points within it the beginning and destination of traffic. And to call the service necessary to such intrastate movement of freight a taking of

terminals is misleading and puts out of view the full signification of the question which the record presents, which is, Is there a distinct and sufficient movement between places which the companies can be required to perform, or which, to put it another way, constitutes transportation and therefore such as the companies were created to perform? That cars may be delivered or received is but an incident. The statute therefore is a regulation of the business of appellants, not an appropriation of their terminal facilities for the use and benefit of other roads. It is therefore justified by the doctrine of *Wisconsin &c., Rd. Co.* v. *Jacobson*, 179 U. S. 287. See also *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257.

II

THE CONDITION AT YORK WHICH UNDERLIES THE UNDUE PREJUDICE WAS BROUGHT ABOUT BY THE CARRIERS THEMSELVES AND MAY NOT BE DEFENDED BECAUSE THEIR AGREEMENT IS IN WRITING

As in the *Louisville & Nashville Case*, 238 U. S. 1, 18, "it will be seen that the Commission is not dealing with an original proposition, but with a condition brought about by the appellants themselves."

As in that case, the order does not direct how the undue prejudice shall be removed, nor does it direct that either company shall give the use of its terminals to the other "but only required them to render to the latter (Tennessee Central) the same service that each of the appellants furnishes the other in switching cars to industries located in and near the Yard." (238 U. S. 18.)

In that case "the appellants were at the present time furnishing switching service to each other on *all* business, and to the Tennessee Central on all except coal and competitive business." (238 U. S. 20.)

The accident of location as within or without the restricted artificial zone established by the carriers for reasons of their own does not bring the case within the principle "that the law does not attempt to equalize opportunities among localities, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46; and that the advantage which comes to a shipper merely as the result of the position of his plant does not constitute illegal preference. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445." (*United States* v. *Illinois Central R. R.*, 263 U. S. 515, 524.)

As in the *Louisville & Nashville Case, supra*, the condition was brought about by the carriers themselves and "Self-interest of the carriers may not override the requirement of equality in rates." (*United States* v. *Illinois Central*, 263 U. S. 515, 524.)

With the exception of the *Nashville Terminals Case, supra*, which grew out of peculiar conditions, this Court has persistently enforced terminal interchanging and switching of traffic on nondiscriminatory bases. *Los Angeles Switching Case*, 234 U. S. 294; *San Francisco Switching Case*, 234 U. S. 315; *Seaboard Air Line Railway* v. *United States*, 254 U. S. 57.

In the instant case the carriers may remove the undue prejudice either by interchanging switching on agreed compensation for the shippers outside of

the restricted artificial zone or they may extend the zone and their operations therein so as to include those industries.

Circuit Judge Davis based the opinion of the District Court on the *Nashville Terminals Case, supra* (Tr. 33), and held that the arrangement between the Pennsylvania and Western Maryland was merely an extension of their rails. The broad distinction between that case and this case has already been pointed out. Here there is no joint ownership and operation of terminals such as existed there. Nor is there any showing here that the two companies are jointly liable for the maintenance and upkeep of the switches or that they ever jointly obligated themselves to maintain the same. They simply agreed to interchange and then allowed each to perform its own switching over the tracks of the other. That is a very different situation than the joint ownership and maintenance of such large terminal facilities as existed at Nashville.

District Judge Witmer dissented on the authority of *Pennsylvania Company* v. *United States, supra,* and *Louisville & Nashville* v. *United States, supra,* in the following words (Tr. 36):

> Appearing that the commission has not acted arbitrarily in finding that prejudice results from the practice of the companies within the zone as compared with interests located beyond similarly located in the same situation, it can not be said that their order was beyond the statute authorizing their action. Pennsylvania Company vs. U. S.

> 236 U. S. 351, Louisville & Nashville R. R. vs. United States, 238 U. S. 1, 18, 19. In the former case at the instance of the Buffalo, Rochester, and Pittsburgh Railway Company it was held by the Interstate Commerce Commission "that in as much as the Pennsylvania Company's refusal to accept from and move to the Rochester Company carload lots of freight within the switching limits of New Castle, while performing the service in connection with the said other three carriers by mutual agreement within said switching limits, was a discrimination, the same was undue, unreasonable, and in violation of the act to regulate commerce, followed by an order to direct the Pennsylvania Company to cease and desist from such undue and unreasonable practice discriminatory as against the Rochester Company. And injunction was denied by the District Court. The Supreme Court in affirming this action stated all that the commission ordered was that the company desist from discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitations, and the District Court was right in so determining.

In *Nashville Terminals Case, supra,* Mr. Justice Holmes said:

> But the very meaning of a line in the law is that right and wrong touch each other and that anyone may get as close to the line as he can if he kept on the right side. (242 U. S. 74.)

The learned District Court misapplied the *Nashville Terminals Case*, the facts of which do not justify placing the Pennsylvania in the instant case on the right side of the line in the law. A proper application of the *New Castle Switching Case*, and the *Louisville & Nashville Case* would have placed the Commission on the right side of the line.

The written agreement to interchange switching which forms the basis for the restricted artificial zone may not prevail against the provisions of the Interstate Commerce Act and the order of the Commission, otherwise, carriers between themselves, shippers as between themselves, and shippers and carriers as between each other, may readily stipulate away the provisions of the Interstate Commerce Act and set them at naught whenever they find it to their advantage or convenience. This Court has rejected contracts as justification for preferences and discriminations in many instances. *New York; New Haven & Hartford* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Company* v. *United States*, 209 U. S. 56; *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467; *Chicago, Indianapolis & Louisville Railway* v. *United States*, 219 U. S. 486; *United States* v. *Lehigh Valley Railroad*, 220 U. S. 257; *Chicago & Alton Railroad* v. *Kirby*, 225 U. S. 155; *United States* v. *Union Stock Yard*, 226 U. S. 286; *Fourche River Lumber Company* v. *Bryant Lumber Company*, 230 U. S. 316; *State of New York* v. *United States*, 257 U. S. 59[illegible].

In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway*, 218 U. S. 88, 108, the Supreme Court, observing "it may be that there can not be an accommodation of all interests in one proceeding," said:

> As we have said, the Commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them and, it may be, will be disturbed or disordered if they be changed. Such circumstance is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem.

III

THE ORDER OF THE COMMISSION WAS JUSTIFIED BY THE ISSUES BEFORE AND INVESTIGATION BY THE COMMISSION

As *amicus curiae* counsel for Messrs. John W. Eshelman & Sons, a concern represented to be engaged in the manufacture of mixed live stock and poultry feeds and located within the restricted artificial zone, has filed a brief which sets forth (p. 2), "The industry has a more direct and vital interest than any other party affected by the order.

* * * The industry was and is a member of the York Manufacturers' Association which filed the complaint upon which the order of the Commission here under review was entered and therefore fully advised as to the nature of that proceeding, and is a proper party of direct interest in the instant proceeding. The said order of the Commission took the industry completely by surprise because *it was not based upon the pleadings* and the record before the Commission and is therefore illegal as will be fully pointed out by petitioner" (pp. 4, 5). (Italics ours.)

The *amicus curiae* sets forth much original matter which does not appear in the transcript. For instance, it is stated that the industry will suffer the loss of its entire investment at York and that the defendant carriers will lose heavy tonnage and large revenues if the order of the Commission is sustained and the Pennsylvania cancels the agreement with the Western Maryland in order to remove the undue prejudice.

This only illustrates the difficulties under which shippers outside of the zone must labor, although they have survived, as Messrs. John W. Eschelman & Sons doubtless will if the order is sustained. This industry appears also to have a deep solicitation for the misfortunes of the Pennsylvania and Western Maryland railroads if this order is sustained as drawn.

This is a review of the opinion and decree of the District Court and not a hearing *de novo* on new

matter. Such matter is not appropriate in this Court at this late stage of the case. Manufacturers' Association of York, of which Messrs. John W. Eshelman & Sons, a corporation, is a member, brought the proceeding before the Commission. The courts and the Commission have always been liberal in allowing associations and interested parties to intervene and to appear by counsel in cases and proceedings. When an association institutes a complaint upon which an order is entered, its members ought not to be allowed individually to break loose from the association and undertake belated interventions. The brief and argument of *amicus curiae* is more in the nature of an original petition to the Interstate Commerce Commission than a brief arguing questions of law on appeal. *Amicus curiae* ought not to be allowed now to come before the court with culled excerpts from the brief of Manufacturers' Association of York before the Commission (which brief is not in the record or otherwise before the court) in order to base an argument upon the proposition that the Commission entered an order for which the Manufacturers' Association did not ask.

Amicus curiae states on page 14, "No violation of section 3 alleged or shown as to the industry." Again, "Moreover, no such preference or prejudice (section 3) was alleged or shown upon the record before the Commission."

Paragraph 10 of the complaint before the Commission in the proceeding entitled "*Manufacturers Asso-*

iation of York, Pa., v. *Pennsylvania Railroad Com-pany,*" is as follows (Tr. 7, 9):

> The rates and practices hereinabove set forth are unjustly discriminatory as against York and subject complainants to undue or unreasonable prejudice or disadvantage, and make or give to other persons or localities undue or unreasonable preference or advantage, and by reason thereof the defendants refuse to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of property to and from their several lines and those connecting therewith, *and are otherwise in violation of the act to regulate commerce as amended (particularly sections 1, 2, and 3 thereof) and of the transportation act of 1920.* (Italics ours.)

Paragraph 10 was denied by Pennsylvania and Western Maryland companies in their respective answers (Tr. 12, 13).

Commissioner Aitchison, in writing the substance of the complaint before the Commission, said (Tr. 15):

> It alleges that the Western Maryland and Pennsylvania each use the tracks of the other to receive or deliver freight at industries within a limited zone within the city; * * * that defendants interchange traffic under reciprocal arrangements with each other and with other carriers at cities near York; *and that defendants' practices and rates resulting therefrom are unduly prejudicial to York and certain shippers therein and unduly preferential of*

other shippers and localities and otherwise in violation of sections 1, 2, and 3 of the Interstate Commerce Act. (Italics ours.)

The complaint and answers before the Commission and the report indicate the erroneous position of the *amicus curiae* that "no such preference or prejudice was alleged or shown upon the record before the Commission."

In its petition filed in the District Court the Pennsylvania Company makes no allegation that the charge of undue prejudice was not seasonably made in the complaint. The question was not raised before, or decided by, the learned District Court. The new facts of which review is asked, if they exist, are outside of the record and the questions sought to be raised thereon are foreclosed. Indeed, the whole brief of *amicus curiae* appears to be based on matter *aliunde*. The brief of *amicus curiae* is not entitled to consideration here.

IV

CONCLUSION

The decree of the District Court should be reversed and the cause remanded with directions to dismiss the petition.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

SEPTEMBER, 1924.

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SUBJECT INDEX

TABLE OF CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA AND Interstate Commerce Commission, appellants, v. THE PENNSYLVANIA RAILROAD COMPANY, appellee	In Equity, No. 68

BRIEF FOR INTERSTATE COMMERCE COMMISSION

STATEMENT

This is an appeal from a final decree of the U. S. District Court for the Middle District of Pennsylvania, annulling and suspending an order of the Interstate Commerce Commission, appellant, hereinafter called the Commission, dated July 11, 1922, as modified by another order of the Commission, dated September 6, 1922. The orders, in so far as material here, are in words and figures as follows:

> This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing

its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and the said Commission having found in said report that the practice of the Pennsylvania Railroad Company and the Western Maryland Railway Company of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within a zone described in the report, while refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located but without the zone, under substantially similar circumstances and conditions, is subjecting various shippers and industries to undue prejudice;

It is ordered, that said defendants be, and they are hereby, notified and required to cease and desist, on or before November 6, 1922, and thereafter to abstain, from practicing the undue prejudice found in said report to exist.

It is further ordered that said defendants be, and they are hereby, notified and required to establish, on or before November 6, 1922, upon notice to this Commission and to the general public by not less than thirty days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid undue prejudice found in said report to exist.

And it is further ordered that this order shall continue in force until the further order of the Commission. (Rec. 27.)

> Upon further consideration of the record in the above-entitled case, and good cause appearing therefor,
>
> *It is ordered*, That the order heretofore entered in this case, which was by its terms made effective November 6, 1922, is hereby modified so as to become effective December 6, 1922, but in all other respects said order shall remain in full force and effect. (Rec. 3–4.)

The order of July 11 was made and entered by the Commission in a proceeding before it, based upon a complaint filed in its office by the Manufacturers' Association of York, Pa. (Rec. 7–10), after hearings held in which evidence was introduced by the parties, and after the matters involved in said proceedings had been argued before the Commission orally and in briefs filed in its office by counsel for the parties (Rec. 2–3).

After hearing evidence and arguments as aforesaid the Commission determined the matters involved in said proceeding and made a report in writing, which is Exhibit E to the petition, in which it set forth its findings of fact and conclusions. In the report, in describing the city of York, the parties to the proceeding, the matters complained of, the relief asked for by the Manufacturers' Association of York, etc., the Commission said:

> York is a city of approximately 50,000 inhabitants in southern Pennsylvania. It is served by the lines of railroad owned and operated by the defendants, known as the

Pennsylvania Railroad, the Western Maryland Railway, and the Maryland & Pennsylvania Railroad. We will refer to these defendants as the Pennsylvania, Western Maryland, and Maryland & Pennsylvania, respectively. The Pennsylvania and Western Maryland do not interchange at York carload traffic destined to or originating within that city, but interchange such traffic at Hanover, Pa., about 19.5 miles from York, and at other connecting points.

Complainant is an incorporated association of business interests of York, which, as herein referred to, comprises also the boroughs of North York and West York. It alleges that the Western Maryland and Pennsylvania each use the tracks of the other to receive or deliver freight at industries within a limited zone within the city; that the Pennsylvania and Maryland & Pennsylvania interchange traffic at York on the basis of the York rates; that certain traffic passing through York is there interchanged between the Pennsylvania and the Western Maryland; that defendants interchange traffic under reciprocal arrangements with each other and with other carriers at cities near York; that defendants refuse to render similar services to all shippers at York; and that defendants' practices and rates resulting therefrom are unduly prejudicial to York and certain shippers therein and unduly preferential of other shippers and localities and otherwise in violation of sections 1, 2, and 3 of the interstate commerce act. Complainant further alleges that it is in the public

interest and practicable to require the use of the terminal facilities of each defendant by the other defendants. It asks us not only to remove the alleged undue prejudice but to place all shippers within the city of York on an exact equality by requiring either interchange at that point, reciprocal switching, the use by one carrier of the terminals of the others, or the publication of joint rates on the York basis to and from all industries wherever located.

The Pennsylvania assumed the burden of the defense. The Western Maryland expressed willingness to provide its just proportion of adequate interchange facilities, to enter into a switching arrangement with the Pennsylvania on a reciprocal basis, and also to absorb the charges of the Maryland & Pennsylvania. The Maryland & Pennsylvania took no active part in the proceeding. (Rec. 15–16.)

The first paragraph of section 3 of the interstate mmerce act, above mentioned, reads:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

In describing pertinent circumstances and conditions and in sustaining the contention concerning a violation of section 3, the Commission further said:

> The Pennsylvania's northerly and southerly line from Harrisburg, Pa., to Baltimore, Md., intersects within York another of its lines which runs easterly from Frederick, Md., and connects with the main line at Lancaster, Pa. These two lines use the same tracks passing the freight station at York. The Western Maryland serves York by means of a branch from Porters, Pa., which terminates at York and enters into only that portion of the city located in the northwestern angle formed by the lines of the Pennsylvania. The terminals of the Western Maryland are a short distance north of the Pennsylvania's freight station located at the junction of its two lines The line of the Western Maryland approaches the Frederick–Lancaster line of the Pennsylvania until immediately west of Codorus Creek where the rights of way are adjacent. Continuing westward their rails parallel each other for about 1⅗ miles, and they diverge to converge again at Hanover. The Maryland & Pennsylvania extends from Baltimore to York and connects with the Pennsylvania in the eastern portion of the city.
>
> The Pennsylvania has two classification and make-up yards at York, with a total available capacity of 363 cars. One is located east and the other north of its freight station. The Western Maryland's swamp yard accommodates 48 cars. There are two points of physical connection between these two railroads—

short switch tracks which connect the lines within the zone hereinafter described. No tracks have been constructed with a view to use in interchanging traffic between the two lines. The interchange tracks of the Pennsylvania and Maryland & Pennsylvania are adequate but not extensive. There is no continuity of rails between the Maryland & Pennsylvania and the Western Maryland except over the lines of the Pennsylvania.

The lines of the Pennsylvania which serve York are a consolidation of various roads built between 1838 and 1876. The Pennsylvania was firmly established when the Baltimore & Harrisburg Railway, the predecessor of the Western Maryland, entered York in 1893. The right of way selected by the latter being adjacent, as described, to the right of way of the Hanover & York Railroad, now the Pennsylvania, crossed the plant tracks of various industries north of that road and severed them from it. The Baltimore & Harrisburg, therefore, entered into contracts with these industries and agreed to preserve their ability to receive and deliver freight via the Hanover & York. A further agreement between the Baltimore & Harrisburg and the Hanover & York in substance provided, among other things, that, for the mutual benefit of the parties and the residents of York, each line would receive from and deliver to the other at the nearest convenient point of connection loaded and empty cars for the purpose of delivering or receiving traffic to and

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from points in the city of York accessible to one carrier but not to the other. It was provided that the charge for this service should not exceed actual cost. The contract described the territory as west of Beaver Street, where the Hanover & York Railway connected with the present Harrisburg-Baltimore line.

The provisions of the contract were not followed literally. In lieu of the method provided in the contract, each carrier has long operated with its own power over short switch tracks to the tracks of the other, and thence over these tracks to the sidings where deliveries are made to the various industries. In practice, receipt and delivery of traffic is now limited to industries located between Codorus Creek and West Market Street. The carrier which performs the line haul effects terminal receipt and delivery at industries within the zone from Codorus Creek to Market Street. Although the tracks continue side by side for some distance west of West Market Street, such industries are construed to be beyond the agreement. If an industry with track connections with the Western Maryland within the zone wishes to forward a car via the Pennsylvania lines, the Pennsylvania furnishes the car, issues the bill of lading, and moves the shipment. If a car is delivered by the Western Maryland to an industry upon the Pennsylvania lines within the zone, the Western Maryland collects the freight and demurrage charges. Neither line pays per diem charges or keeps any record of cars handled to or

from industries on its lines by the other carrier. Each carrier has in the past refused to extend the arrangement to include industries without the zone, or to handle in any manner, except via Hanover or other junction points, traffic on which the other carrier has received the line haul. The Western Maryland has expressed a willingness to handle such traffic at York in the future on a reciprocal basis.

There are about 300 industries of various kinds at York. More than 100 have spur tracks connecting them with one or more carriers. There are 17 industries within the zone; of these 8 connect with the Western Maryland, 7 with the Pennsylvania, and 2 with both lines. East and west of the zone, where the railroads diverge, are 8 industries with industry tracks leading to both the Pennsylvania and Western Maryland. Also outside the zone 46 industries are reached exclusively by the various lines of the Pennsylvania, 27 by the Maryland & Pennsylvania, and 5 by the Western Maryland. During an average month the inbound and outbound traffic of the Pennsylvania and that handled in connection with the Maryland & Pennsylvania amounted to 107,613 tons and that of the Western Maryland to 23,427 tons. If reciprocal switching were established, 86,000 tons of this traffic now controlled by the Pennsylvania would be open to the competition of the Western Maryland and 6,696 controlled by the latter would be open to the competition of the Pennsylvania.

Under the agreement between the carriers they accord the industries within the zone all advantages which would accrue to them if there were interchange at York with mutual absorption of switching charges. The record discloses in detail the disadvantages of industries within York located outside the zone. As typical of the situation, the York Body Corporation and the Martin-Parry Corporation, competing manufacturers of automobile bodies, may be selected. Both are located on the Western Maryland, the former approximately in the center of the zone and the latter 1 mile west of its competitor's plant and about 500 yards outside the zone. Traffic to and from the plant of the York Body Corporation is handled by the Pennsylvania at the York rate, as if the industry were connected with its rails. If a car consigned to its competitor arrives in York via the Pennsylvania, the consignee must either dray the contents to the plant or have it reshipped to Hanover via the Pennsylvania and back via the Western Maryland, a total distance of 39 miles. Rates from York to York via Hanover are ordinarily on a class basis, and the sixth-class rate applicable on much of the traffic is 11 cents per 100 pounds. The additional cost of reshipping via Hanover is usually in excess of $30 per car. In order to minimize its disadvantages, the Martin-Parry Corporation has constructed a siding connected with the Pennsylvania and trucks its freight to and from its plant when it utilizes the Pennsylvania's rails at York. The cost of drayage to this

company alone is $13,000 per annum. Other industries on both the Western Maryland and Pennsylvania are in the same situation as the Martin-Parry Corporation, with the added disadvantage of being required to dray a greater distance to and from the public team tracks.

All shippers within the zone can utilize the services of both the Western Maryland and the Pennsylvania, and equally with other shippers on the Pennsylvania the service of the Maryland & Pennsylvania. Shippers within the zone are unaffected by embargoes, shortage of general equipment, or lack of special equipment occurring on one line; they can at all times utilize their loading or unloading devices; they are in a position to take advantage of the lower rate when the rates between York and originating or destination points differ via the Western Maryland and the Pennsylvania; they can utilize the short routes with an attendant saving of time; and they are saved at all times in connection with the line-haul movements from the additional expense, inconvenience, and delay of drayage or of the additional haul to Hanover and back. Where shippers on the Western Maryland and the Pennsylvania without the zone do not dray, they are practically in the same position as if located on these lines in cities 39 miles apart, but with the added disadvantage that failure to route or errors by shippers or carriers may subject them to inconvenience and expense.

* * * Joint class rates on the flat York basis have been established by the Pennsyl-

vania and Western Maryland between York and points on their respective lines applying via Hanover or other connecting points. This arrangement will ordinarily involve a haul through York by the Pennsylvania and a back haul from Hanover by the Western Maryland on traffic originating north, south, and east of York. There are in effect a number of commodity rates over like routes. The testimony indicates there is a complete understanding between the carriers to publish such additional commodity rates on the same basis as circumstances may justify. This arrangement does not extend to points located on the connections of either carrier. Terminal routing must be specified to secure delivery at the joint rates provided. If through ignorance of the circumstances attending delivery at York a shipper at a distant point fails to designate terminal delivery, the car may arrive on the wrong road with attending inconvenience and expense. The shippers within the zone are not required to have terminal routing specified in order to enjoy the York rates. (Rec. 16–19.)

From the standpoint of carriage, the situation of industries inside and outside the zone is substantially similar. They apparently form parts of one business community. The advantage of the shippers within the zone results from the contract of the carriers and not from a controlling transportation difference. (Rec. 19.)

We find that it has not been shown to be in the public interest to require the use of the

terminal facilities or main-line tracks of the Pennsylvania at York by the Western Maryland.

We further find that the practice of the Pennsylvania and the Western Maryland of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within the zone hereinbefore described, and of thereby according to shippers within the zone the benefit in service and rates of location upon both lines, while contemporaneously refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located within the city of York, but without the zone, or otherwise to accord to shippers without the zone the benefit of the service and rates of both lines, is unduly preferential of shippers within the zone, and subjects shippers on their lines without the zone to undue prejudice and disadvantage. (Rec. 24.)

The case was heard in the District Court upon the pleadings; that is to say, the petition and motions to dismiss the petition filed by the United States and the Interstate Commerce Commission.

The errors assigned are six in number, but with the exception of the fourth they are general in character. The exception referred to may be summarized as follows:

> The court erred in substituting its judgment for the judgment of the Commission as to the question of undue prejudice.

ARGUMENT

I

THE COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THE JUDGMENT OF THE COMMISSION AS TO THE QUESTION OF UNDUE PREJUDICE.

The pertinent questions of fact are not in dispute. Before discussing the subject-matter of the above heading, it is therefore proper to call attention to the allegations of fact contained in the petition, which may be summarized as follows:

In paragraph 1 the appellee and the business done by it are described. Paragraph 2 contains a description of the Manufacturers Association of York, Pa., which was the complainant in the proceeding before the Commission, and a statement concerning the purpose for which the association was incorporated. Paragraphs 3 to 16, inclusive, are devoted to a description of the proceedings before the Commission, including the complaint which was the basis of the action taken before the Commission, matters complained of, relief asked for by the complainant, pleadings filed by the appellee and other carriers, hearings in which evidence was introduced and hearings of oral argument, the filing of briefs, and copies of the body of said order of July 11, and of an order dated September 6, 1922. The latter order modifies the order of July 11, only by changing the effective date from November 6 to December 6, 1922. In paragraphs 17 to 23, inclusive, the appellee, in various forms of expression, sets forth its belief that

the order of July 11 is unconstitutional and void, first, because in making it the Commission acted arbitrarily and beyond the powers conferred upon it by the laws under which it operates, and, second, because the order is not restricted to interstate commerce. In paragraphs 24 and 25 the appellee avers that it will be inconvenienced and damaged unless the order of July 11 is annulled and set aside.

Appellee does not attempt to show any irregularity in the proceedings before the Commission which preceded the making of the order. On the contrary it calls attention to the fact that two hearings were held for the purpose of affording to the parties an opportunity to introduce testimony and other evidence in connection with the issues which resulted from the filing in the Commission's office of the aforesaid pleadings, and that a third hearing was held to enable counsel for the parties to present to the Commission their views in connection with those issues. Appellee does not undertake to show that any statement of fact contained in the Commission's report is incorrect; nevertheless, in section 20 of its petition it states that it is "advised by counsel and thereupon avers" that the order requiring the removal of the undue prejudice which was found by the Commission to exist "is unwarranted and illegal under the Interstate Commerce Act."

We have already shown that, by section 3 of that act, the undue prejudice mentioned is rendered un-

lawful, and the first paragraph of section 15 of the act reads as follows:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case or the maximum or minimum, or maximum and minimum to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be

> just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

It is therefore apparent that, unless reasons exist which will justify a disregard of the Commission's conclusion concerning undue prejudice, the relief asked for by appellee will not be granted by the court.

The jurisdiction a court may exercise, in a case like the one now under consideration, was clearly and succinctly set forth by this court in its decision in *Procter & Gamble* v. *United States*, 225 U. S. 282, from which we quote as follows:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing

> or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452. * * *. (Id. 297–298.)

We have shown that, in form at least, the Commission, in making the order of July 11, did not exceed the authority conferred upon it by the interstate commerce act, and the constitutionality of that act, to the extent that it confers such authority, has been so often upheld by this court that we think a citation of authorities in this connection would be a work of supererogation.

In sustaining the aforesaid contention of appellee that the order requiring the removal of the undue prejudice which was found by the Commission to exist "is unwarranted and illegal under the Interstate Commerce Act," the District Court said:

> It has been repeatedly held that where one company serves a community or industry located on the tracks of another under a trackage arrangement the situation in effect is the same as if the former company had extended its own tracks to such community or industry. *Commercial Club of Superior, Wis.*, v. *Great Northern Ry.*, 24 I. C. C. 96;

Penick & Ford v. *Director General*, 61 I. C. C. 173; *Louisville & Nashville Railroad Company* v. *United States et al.*, 242 U. S. 60. The industries, therefore, located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies, and the industries beyond this zone as located on the tracks of one of the companies only. Consequently in legal effect those industries which are within the zone and those without the zone are not similarly situated, but are in a substantially different position. And so the advantage enjoyed by the industries within the zone over those without the zone, is not within the meaning of the Act, an undue or unreasonable preference. *Ridge Coal Mining Co.* v. *Missouri Pacific R. R. Co.*, 62 I. C. C. 259; *Dering Mines Co., et al.* v. *Director General*, 62 I. C. C. 265; *Louisville & Nashville Railroad Company et al.* v. *United States et al., supra.* "A carrier must use its existing facilities impartially," and the railroads, under the facts in this case, are under no obligation to extend or curtail their facilities. The legal position of the industries in the zone is just the same as though they were located at some other part of the city away from the tracks. An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon carriers to overcome such disadvantage at their expense, and this is what the industries outside of the zone, so far as the legal situation is concerned, did. (Rec. 33–34.)

For convenience we will repeat here a portion of what the Commission said about advantages and disadvantages, namely:

> Under the agreement between the carriers they accord the industries within the zone all advantages which would accrue to them if there were interchange at York with mutual absorption of switching charges. The record discloses in detail the disadvantages of industries within York located outside the zone. As typical of the situation, the York Body Corporation and the Martin-Parry Corporation, competing manufacturers of automobile bodies, may be selected. Both are located on the Western Maryland, the former approximately in the center of the zone and the latter 1 mile west of its competitor's plant and about 500 yards outside the zone. Traffic to and from the plant of the York Body Corporation is handled by the Pennsylvania at the York rate, as if the industry were connected with its rails. If a car consigned to its competitor arrives in York via the Pennsylvania, the consignee must either dray the contents to the plant or have it reshipped to Hanover via the Pennsylvania and back via the Western Maryland, a total distance of 39 miles. Rates from York to York via Hanover are ordinarily on a class basis, and the sixth-class rate applicable on much of the traffic is 11 cents per 100 pounds. The additional cost of reshipping via Hanover is usually in excess of $30 per car. In order to minimize its disadvantages, the Martin-Parry Corporation has constructed a siding connected with

the Pennsylvania and trucks its freight to and from its plant when it utilizes the Pennsylvania's rails at York. The cost of drayage to this company alone is $13,000 per annum. Other industries on both the Western Maryland and Pennsylvania are in the same situation as the Martin-Parry Corporation, with the added disadvantage of being required to dray a greater distance to and from the public team tracks.

All shippers within the zone can utilize the services of both the Western Maryland and the Pennsylvania, and equally with other shippers on the Pennsylvania the service of the Maryland & Pennsylvania. Shippers within the zone are unaffected by embargoes, shortage of general equipment, or lack of special equipment occurring on one line; they can at all times utilize their loading or unloading devices; they are in a position to take advantage of the lower rate when the rates between York and originating or destination points differ via the Western Maryland and the Pennsylvania; they can utilize the short routes with an attendant saving of time; and they are saved at all times in connection with the line-haul movements from the additional expense, inconvenience, and delay of drayage or of the additional haul to Hanover and back. Where shippers on the Western Maryland and the Pennsylvania without the zone do not dray, they are practically in the same position as if located on these lines in cities 39 miles apart, but with the added disadvantage that failure to route or errors by shippers or carriers may

> subject them to inconvenience and expense. (Rec. 18–19.)

We also repeat what the Commission said concerning similarity of circumstances and conditions, as follows:

> From the standpoint of carriage, the situation of industries inside and outside the zone is substantially similar. They apparently form parts of one business community. The advantage of the shippers within the zone results from the contract of the carriers and not from a controlling transportation difference. (Rec. 19.)

In its report the Commission, in referring to a complaint filed in 1909 by the Manufacturers Association of York, further said:

> The Pennsylvania State Railroad Commission, upon petition of complainant in 1909, found that the shippers located outside the zone were unduly prejudiced and recommended the removal of the discrimination. * * *. (Rec. 23.)

The binding force of the Commission's finding concerning similarity in circumstances and conditions, as between the industries located within the restricted zone on the one hand and those located outside of that zone on the other, is well illustrated by a decision of this court rendered by former Chief Justice White, in *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Company*, 220 U. S. 235, from which we quote as follows:

> As shown by the opinion of the Commission and that of the two members who dissented,

there were many and wide differences in the views expressed. On their face, however, when ultimately reduced they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition, that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry, or what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. *We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. Baltimore & Ohio R. R.* v. *Pitcairn*, 215 U. S. 481. *This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission.* (Italics ours.) (Id. 251–252.)

We have examined carefully the decisions cited, as above shown, by the District Court and respect-

fully submit that none of them is apposite. Reasons upon which we base this conclusion are:

In *Commercial Club of Superior, Wis.*, v. *Great Northern Railway*, 24 I. C. C. 96, the territory and rate adjustments involved were described by the Commission as follows:

> These proceedings grow out of the rivalries between cities at which grain markets or milling interests are located and which are commonly termed "primary markets." The rates on grain from North and South Dakota, southern Minnesota, northern Iowa, and northern Nebraska to Superior and Milwaukee, Wis., and Duluth, Minn., as compared with rates from the same territory to Lake Michigan ports, Minneapolis, and other markets, as well as the rates on grain products from Superior via lake and rail to Atlantic seaboard points, as compared with like rates from Chicago, are put in issue. The cases will be referred to herein as the Superior, Milwaukee, and Duluth cases, respectively. All rates are stated in cents per 100 pounds. (Id. 98.)

In *Penick & Ford* v. *Director General*, 61 I. C. C. 173, average demurrage agreements were involved, and the complainant sought to compel different carriers to enter into a single joint arrangement with it for the interchange of demurrage credits and debits. In this connection language of the Commission was:

> * * * No undue prejudice was alleged in this case.
>
> With respect to the period covered by the complaint prior to Federal control, we con-

> clude that the situation at complainant's plant was the same as if the rails of the three carriers mentioned separately reached the plant and that each of the carriers was within its rights in applying its separately established demurrage rules in connection with the traffic which it handled, and that it was not unlawful to require the execution of separate average agreements. (Id. 176.)

In *Louisville & Nashville Railroad Company* v. *United States*, 242 U. S. 60, wherein a decision was rendered on December 4, 1916, a majority of this court held that, as section 3 of the interstate commerce act was then worded, where two carriers operated a terminal jointly they could not be compelled to give the use of their terminal to a third carrier. From the conclusion thus reached four members of the court dissented, and since the date of said decision section 3 of the act has been materially modified, in so far as it relates to the use by one carrier of the terminals of another carrier. It will be observed, however, that the issue presented for determination in that case is not involved in this case.

In *Ridge Coal Mining Company* v. *Missouri Pacific Railroad Company et al.*, 62 I. C. C. 259, the Commission said:

> It is not to be understood from the foregoing that a trackage agreement might not be the means of extending preferential treatment to one shipper to the undue prejudice of another. * * * Upon this record, how-

> ever, there is no showing of such similarity in circumstances and conditions at mines in other Illinois coal fields at which the Burlington absorbs switching charges, and at complainant's mine, as would support a finding that all are entitled to like treatment. (Id. 262.)

And in *Dering Mines Company et al.* v. *Director General et al.*, 62 I. C. C. 265, pertinent language of the Commission was as follows:

> This case, in so far as the question of joint service is concerned, is controlled by the principles announced in *Ridge Coal Mining Co.* v. *M. P. R. R. Co.*, 62 I. C. C. 259. We there found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine; that a mine which is accorded a joint status by means of a trackage agreement is in the same category as a junction-point mine; and that, generally speaking, a carrier is not chargeable with undue prejudice because it extends its service to certain mines, either by extensions of its rails or under trackage agreements, thereby giving them the advantages of a joint or junction-point status, while declining to make other extensions or trackage agreements to extend its service to other mines. We recognized that there might be certain exceptions to these general principles, but no exceptional circumstances are here presented. (Id. 267–268.)

We think the matters above set forth clearly indicate that in declining to give effect to the Commission's finding that, "From the standpoint of carriage, the situation of industries inside and outside the zone is substantially similar," and to its conclusion concerning undue prejudice, the court erroneously substituted its judgment for the judgment of the Commission in connection with questions of fact which are exclusively within the Commission's jurisdiction.

In *Texas & Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197, this court, in speaking of the prohibitions contained in section 3 of the interstate commerce act, said:

> The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact. (Id. 219.)

II

THE FACT THAT THE ORDER OF JULY 11 IS NOT BY ITS TERMS RESTRICTED TO INTERSTATE COMMERCE DOES NOT RENDER IT INVALID

It is true that the order is not, by its terms, restricted to interstate commerce, and this is one reason advanced by appellee in support of its conclusion that the order is invalid, but it is also true that the order need not be thus restricted, for the reason that, as shown by section 1 of said act, the jurisdic-

tion of the Commission is not confined to transportation in interstate commerce; it includes also transportation in foreign commerce. However, the court will not presume that the Commission intended to make the order apply to matters not within its jurisdiction, since the order does not, by its terms, cover any of such matters.

In *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, this court had before it three paragraphs of section 1 of the interstate commerce act, the provisions of which were not, by their terms, confined to interstate and foreign commerce, and, in applying the rule of construction above mentioned and holding that the provisions do not include matters which are purely intrastate in character, it said:

> If paragraphs 18, 19, and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (Id. 217.)

It is clear, we submit, that the order of July 11 is susceptible of a construction which will confine its application to matters within the jurisdiction of the

Commission, and under these circumstances we feel certain the court will not place upon it a contrary construction.

CONCLUSION

We have shown that the order must be held to be valid, unless the court may properly conclude that, although technically within, it is actually outside of, the authority conferred upon the Commission by said act; and this brings us to what we believe to be the only real question presented for determination by the court in this case. Do the order, and the report of the Commission which is referred to therein and made a part thereof, show that in making the order the Commission acted arbitrarily, within the judicial meaning of that term?

In its report, as hereinbefore shown, the Commission described very fully circumstances and conditions existing at York in connection with industries there located which have track connections with the line of the Pennsylvania, or with that of the Western Maryland, or with both lines, and, as hereinbefore stated, none of the facts found by the Commission in this connection is controverted by appellee. The Commission pointed out the differences in advantages and disadvantages, as between the different industries, caused by the regulations and practices indulged in by those carriers, and found by the Commission to result in undue prejudice and to constitute a violation of section 3 of the interstate commerce act. The Commission also called attention to the fact

that the conclusion of undue prejudice upon which its order of July 11 is based is the same in substance as a conclusion reported in 1909 by the Pennsylvania State Railroad Commission.

It will be observed that by the order of July 11 the Commission has left the Pennsylvania and Western Maryland entirely free to remove the undue prejudice which is the subject matter of the order by the employment of any lawful means. It has not made any positive requirement as to interchange, reciprocal switching, common use of terminals, or the establishment of joint rates. The language of paragraph 20 of the petition appears to us to indicate that the appellee regards the disposition thus manifested, to leave to the carriers as great freedom of action as is consistent with the proper administration of the law under which the Commission operates, as evidence tending to show that in making the order the Commission acted arbitrarily. We feel certain, however, that the court will reach a contrary conclusion. In this connection the District Court said:

> The Commission did not specifically state in what way the defendants were to cease and desist from practicing the undue prejudice found; whether by extending the practice to industries outside the zone or by stopping the practice altogether. The Commission could have ordered the extension of the practice to industries outside the zone if it had found the same to be "in the public interest and to be practicable." But the Commission found as

> a fact that it had "not been shown to be in the public interest to require the use of the terminal facilities of the main-line tracks of the Pennsylvania at York by the Western Maryland," and so under that finding and so long as it stands the Commission may not order the practice existing between the two companies within the zone extended to industries situated along the parallel tracks outside the zone. It follows, therefore, that the only way by which they can order the Companies to cease and desist from practicing the undue prejudice is by abolishing those practices within the zone. (Rec. 33.)

We think the language of the District Court last above quoted indicates that the court did not fully appreciate the difference between *requiring* one carrier to give the use of its terminals to another carrier on the one hand, and leaving it free to do so on the other, for the purpose of removing a prejudice found by the Commission to be undue. It is apparent, also, that the District Court's conclusion, to the effect that the only other way in which the prejudice can be removed is by abolishing the aforesaid practices of the Pennsylvania and the Western Maryland, in what is designated by the Commission as the restricted zone, overlooks the fact that the prejudice may be eliminated by establishing joint rates and making them applicable to transportation between points on the line of the Pennsylvania and points on the line of the Western Maryland. As hereinbefore shown such joint rates are now in effect and

are applied at York to transportation between points on the line of the Pennsylvania and points on the line of the Maryland & Pennsylvania.

If the Pennsylvania and the Western Maryland are unable to reach an agreement concerning the divisions between them of such joint rates, the Commission can fix the divisions under the authority conferred upon it by paragraph (6) of section 15 of the interstate commerce act, but such failures do not justify the prejudice which results from permitting shippers located at points on the line of the Pennsylvania to have their shipments transported direct from such points to points on the line of the Maryland & Pennsylvania and in the opposite direction, while requiring shippers located at the Pennsylvania points who desire to ship therefrom to points on the Western Maryland and in the opposite direction to bear the aforesaid expense of an unnecessary and out-of-line haul from York to Hanover and return, a distance of 39 miles.

The contention of the appellee appears to be that it has a right to subject shippers to and from industries located on its line at York to the prejudice and disadvantage found by the Commission to be undue and in violation of section 3 of the interstate commerce act, and to compel such shippers to bear the expense of the unnecessary and out-of-line haul above mentioned, for the purpose of obtaining for itself a longer haul of the traffic covered by the shipments than otherwise it might be able to secure, but this contention, we submit, is unsound for the reason,

among others, that it is in conflict with the ruling of this court in *United States and Interstate Commerce Commission* v. *American Railway Express Company, et al.*, 265 U. S. 425. In the latter case the American Railway Express Company contended that an order of the Commission requiring it and the Southeastern Express Company to establish through routes, for the transportation of express traffic between points in the north and points in the southeast and provide for transfers of the traffic at Washington from and to the line of the American to and from the line of the Southeastern, at the option of shippers, was invalid because it would prevent the American from obtaining for its own line a haul of the traffic as long as it otherwise might secure. In holding the contention to be without merit, this court, among other things, said:

> * * * As the American has no absolute right to retain traffic which it originates, and as the provision authorizing the shipper to direct the routing is reasonable, the order does not violate any of its constitutional rights. * * *. (Id. 437–438.)

For the reasons above set forth we insist that the decree of the District Court should be reversed.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

OCTOBER, 1924.

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(29)

No. 68.

OCTOBER TERM, 1924

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY.

GEORGE HAY KAIN,
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INDEX.

LIST OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1924. No. 68.

United States of America and Interstate Commerce Commission, Appellants,

vs.

The Pennsylvania Railroad Company.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY.

I. STATEMENT OF THE CASE.

This case is brought under the provisions of the Act of Congress (38 Stat. L. 219) which establishes the procedure in cases where an effort is made to suspend or set aside, in whole or in part, any order of the Interstate Commerce Commission.

The order of the Commission which is sought to be set aside in this case was entered in a proceeding initiated before that tribunal by the Manufacturers Association of York, and carried on the Commission's Docket as No. 11455. In this proceeding the Manufacturers Association

joined as defendants The Pennsylvania Railroad Company, the appellee here, and two other railroad companies, the Maryland & Pennsylvania Railroad Company and the Western Maryland Railway Company. These three railroad companies reach the city of York, Pennsylvania, and the complaint was filed in order (*a*) to force the defendants to interchange at York all traffic originating at York or destined to York, (*b*) to force the use of all terminal facilities at York, including the main line of track or tracks, for a reasonable distance outside of such terminal, of any carrier by the other carriers; and (*c*) to force the establishment of the service of reciprocal switching throughout York (see paragraph 13 of petition before Interstate Commerce Commission, Transcript, pages 9-10).

The position of the complainant was that the failure on the part of the defendants to establish the arrangements sought by the Manufacturers Association created undue preference and discrimination in violation of Section 3 of the Interstate Commerce Act, and that the Commission should exercise the power conferred upon it by the amendment to the Interstate Commerce Act incorporated therein by the Transportation Act, 1920 (41 Stat. L. 480), under which the Commission is authorized, if it finds it to be in the public interest and to be practicable—without substantially impairing the ability of the carrier owning or entitled to the enjoyment of terminal facilities, to handle its own business—to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier by another carrier or carriers, etc. The grounds on which the Manufacturers Association claimed that the arrangements at York created discrimination were as follows (see Exhibit A to petition, Transcript, pages 7-10):—

(*a*) That the arrangements at York differed from those in other cities.

(*b*) That the arrangements existing between The Pennsylvania Railroad Company and the Maryland & Pennsylvania Railroad Company differed from those existing be-

tween The Pennsylvania Railroad Company and the Western Maryland Railway Company.

(*c*) That by virtue of an old agreement between the predecessors of the two companies, operation, within a limited part of the city of York where their tracks run side by side (between Codorus Creek and West Market Street; see Exhibit E, page 17 and Exhibit F, page 28 of the Transcript*) the Western Maryland is accorded the use of the tracks of the Pennsylvania, and may, with its own engines, pass from its own tracks to the tracks of the Pennsylvania, and thence to an industry siding connected with the track of the Pennsylvania, and there receive or deliver a car of outbound or inbound freight, as the case may be; and likewise, the Pennsylvania may, with its engines, use the track of the Western Maryland, and move over such track to industries having siding connection with the Western Maryland, and there receive or deliver a car of outbound or inbound traffic, as the case may be (see the decision of the Interstate Commerce Commission, page 17 of the Transcript).

The Interstate Commerce Commission found that

> "It has not been shown to be in the public interest to require the use of the terminal facilities or main-line tracks of the Pennsylvania at York by the Western Maryland," (Transcript, page 24).

and it consequently refused to exercise the new power conferred upon it by the amendment to the Interstate Commerce Act above referred to. But it held that the arrangement between The Pennsylvania Railroad Company and the Western Maryland Railway Company resulting from the mutual trackage privileges accorded each other, as described above in paragraph (*c*), created undue preference

* Exhibit F (Transcript, page 28) is a blue print showing the general outline of the city of York and the location of the railroads serving the city. For convenience of reference there is attached to the brief as an Appendix a diagram based upon this Exhibit, showing in skeleton fashion the outline of the railroads in their general relation to each other. It will serve to elucidate most of the relevant facts respecting the physical situation at York.

in violation of the Interstate Commerce Act. It entered an order, quoted *in extenso* in the Railroad Company's Bill (Transcript, page 27, and see below, pages 21-22 of this brief), wherein it finds that "the practice of The Pennsylvania Railroad Company and the Western Maryland Railway Company of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within a zone described in the report, while refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located but without the zone, under substantially similar circumstances and conditions, is subjecting various shippers and industries to undue prejudice," and accordingly ordered that the defendants should cease and desist from the undue prejudice found to exist.*

It is manifest that this order requires The Pennsylvania Railroad Company, either to extend to the Western Maryland Railway Company the use of its tracks and terminal facilities throughout the city of York, which the Commission, in terms, finds "has not been shown to be in the public interest," or to withdraw the trackage privilege from the Western Maryland in the limited portion of York where it has heretofore existed, and suffer, in consequence, on its part, the loss of the correspondng privilege which the Western Maryland has accorded it on its tracks.

But, since the Commission has held that, "We find that it has not been shown to be in the public interest to require the use of the terminal facilities or main-line tracks of the Pennsylvania at York by the Western Maryland" (Transcript, page 24), it seems clear that the lower Court was right in reaching the conclusion which is embodied in the following excerpt from its opinion (Transcript, page 33):—

> "The Commission did not specifically state in what way the defendants were to cease and desist from practicing the undue prejudice found; whether by ex-

* The Commission's decision is reported at 73 I. C. C. 40.

tending the practice to industries outside the zone or by stopping the practice altogether. The Commission could have ordered the extension of the practice to industries outside the zone, if it had found the same to be 'in the public interest and to be practicable.' But the Commission found as a fact that it had 'not been shown to be in the public interest to require the use of the terminal facilities of the main-line tracks of the Pennsylvania at York by the Western Maryland,' and so under that finding and so long as it stands, the Commission may not order the practice existing between the two companies within the zone extended to industries situated along the parallel tracks outside the zone. It follows, therefore, that the only way by which they can order the Companies to cease and desist from practicing the undue prejudice is by abolishing those practices within the zone."

For convenience of reference the following facts found the Commission are here inserted:—

"York is a city of approximately 50,000 inhabitants in southern Pennsylvania. It is served by the lines of railroad owned and operated by the defendants, known as the Pennsylvania Railroad, the Western Maryland Railway, and the Maryland & Pennsylvania Railroad. We will refer to these defendants as the Pennsylvania, Western Maryland, and Maryland & Pennsylvania, respectively. The Pennsylvania and Western Maryland *do not interchange at York carload traffic destined to or originating within that city,** but interchange such traffic at Hanover, Pa., about 19.5 miles from York, and at other connecting points." (Transcript, page 15.)

* * * * * * *

"The Pennsylvania's northerly and southerly line from Harrisburg, Pa., to Baltimore, Md., intersects

* Italics ours.

within York another of its lines which runs easterly from Frederick, Md., and connects with the main line at Lancaster, Pa. These two lines use the same tracks passing the freight station at York. The Western Maryland serves York by means of a branch from Porters, Pa., which terminates at York and enters into only that portion of the city located in the northwestern angle formed by the lines of the Pennsylvania. The terminals of the Western Maryland are a short distance north of the Pennsylvania's freight station located at the junction of its two lines. The line of the Western Maryland approaches the Frederick-Lancaster line of the Pennsylvania until immediately west of Codorus Creek, where the rights of way are adjacent. Continuing westward their rails parallel each other for about 1⅔ miles, and they diverge to converge again at Hanover. The Maryland & Pennsylvania extends from Baltimore to York and connects with the Pennsylvania in the eastern portion of the city." (Transcript, page 16.)

* * * * * * *

"The lines of the Pennsylvania which serve York are a consolidation of various roads built between 1838 and 1876. The Pennsylvania was firmly established when the Baltimore & Harrisburg Railway, the predecessor of the Western Maryland, entered York in 1893. The right of way selected by the latter being adjacent, as described, to the right of way of the Hanover & York Railroad, now the Pennsylvania, crossed the plant tracks of various industries north of that road and severed them from it. The Baltimore & Harrisburg, therefore, entered into contracts with these industries and agreed to preserve their ability to receive and deliver freight via the Hanover & York. A further agreement between the Baltimore & Harrisburg and the Hanover & York in substance provided, among other things, that, for the mutual benefit of the parties and the residents of York, each line would

receive from and deliver to the other at the nearest convenient point of connection loaded and empty cars for the purpose of delivering or receiving traffic to and from points in the city of York accessible to one carrier but not to the other. It was provided that the charge for this service should not exceed actual cost. The contract described the territory as west of Beaver Street, where the Hanover & York Railway connected with the present Harrisburg-Baltimore line.

*"The provisions of the contract were not followed literally. In lieu of the method provided in the contract, each carrier has long operated with its own power over short switch tracks to the tracks of the other, and thence over these tracks to the sidings where deliveries are made to the various industries. In practice, receipt and delivery of traffic is now limited to industries located between Codorus Creek and West Market Street. The carrier which performs the line haul effects terminal receipt and delivery at industries within the zone from Codorus Creek to Market Street.**
Although the tracks continue side by side for some distance west of West Market Street, such industries are construed to be beyond the agreement. *If an industry with track connections with the Western Maryland within the zone wishes to forward a car via the Pennsylvania lines, the Pennsylvania furnishes the car, issues the bill of lading, and moves the shipment. If a car is delivered by the Western Maryland to an industry upon the Pennsylvania lines within the zone, the Western Maryland collects the freight and demurrage charges. Neither line pays per diem charges or keeps any record of cars handled to or from industries on its lines by the other carrier. Each carrier has in the past refused to extend the arrangement to include industries without the zone, or to handle in any manner, except via Hanover or other junction points, traffic on which the other carrier has received*

* Italics ours.

*the line haul.** The Western Maryland has expressed a willingness to handle such traffic at York in the future on a reciprocal basis.

"There are about 300 industries of various kinds at York. More than 100 have spur tracks connecting them with one or more carriers. There are 17 industries within the zone; of these 8 connect with the Western Maryland, 7 with the Pennsylvania, and 2 with both lines. East and west of the zone, where the railroads diverge, are 8 industries with industry tracks leading to both the Pennsylvania and Western Maryland. Also outside the zone 46 industries are reached exclusively by the various lines of the Pennsylvania, 27 by the Maryland & Pennsylvania, and 5 by the Western Maryland. During an average month the inbound and outbound traffic of the Pennsylvania and that handled in connection with the Maryland & Pennsylvania amounted to 107,613 tons and that of the Western Maryland to 23,427 tons. *If reciprocal switching were established 86,000 tons of this traffic now controlled by the Pennsylvania would be open to the competition of the Western Maryland and 6,696 controlled by the latter would be open to the competition of the Pennsylvania."** (Transcript, pages 17-18.)

* * * * * * *

"In determining what is 'in the public interest' in a given case, as antecedent to the affirmative exercise of this broad grant of power, we must take into consideration not only the interests of the particular shippers located at or near the terminal involved but also the interests of the carriers and of the general public. In this case to require the Pennsylvania to afford use of its terminal facilities by another carrier would be tantamount in practical effect to requiring a division between such carriers of traffic naturally tributary to the Pennsylvania. The loss to the Penn-

* Italics ours.

sylvania and the gain to the Western Maryland would each be considerable. There is no showing that the shippers are so inadequately served at present that we are warranted, from the standpoint of the public interest, in depriving the carrier first on the ground of an important volume of the traffic originating along its line, by the direct and affirmative exercise of the power to require the Pennsylvania to share its terminal facilities with the Western Maryland, and it is therefore unnecessary to decide as to the practicability of such an arrangement." (Transcript, pages 23-24.)

* * * * * * *

*"We find that it has not been shown to be in the public interest to require the use of the terminal facilities or main-line tracks of the Pennsylvania at York by the Western Maryland**

"We further find that the practice of the Pennsylvania and the Western Maryland *of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within the zone hereinbefore described, and of thereby according to shippers within the zone the benefit in service and rates of location upon both lines, while contemporaneously refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located within the city of York, but without the zone, or otherwise to accord to shippers without the zone the benefit of the service and rates of both lines,** is unduly preferential of shippers within the zone, and subjects shippers on their lines without the zone to undue prejudice and disadvantage.

We further find that the practice of the Pennsylvania in interchanging traffic with the Maryland & Pennsylvania and switching traffic to and from its

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* Italics ours.

> junction with that road while contemporaneously refusing to interchange and to switch traffic to and from the Western Maryland at York has not been shown on this record to be unduly prejudicial to the Western Maryland, to shippers and consignees patronizing its routes and to the traffic of such patrons, and is not unduly preferential of the Maryland & Pennsylvania shippers and consignees over that route and their traffic." (Transcript, pages 24-25.)

The case was heard on motion of the Government and the Interstate Commerce Commission to dismiss the petition of the Railroad Company to suspend and set aside the order of the Commission, so that the averments of the petition are admitted.

II. ARGUMENT.

The contention of The Pennsylvania Railroad Company is that this order of the Commission involves, on its face, errors of law, in that (*a*) it predicates a finding of discrimination or undue preference upon the granting by two railroads, the one to the other, of mutual trackage rights, and (*b*) is not restricted, in its terms and scope, to interstate commerce. It is the contention of the petitioner that the order entered is not only outside of the authority conferred upon the Interstate Commerce Commission by the Act of Congress, but that, in the circumstances, it constitutes an arbitrary exercise of power in violation of the due process clause of the Constitution, and transgresses the limitations upon the Federal power resulting from the fact that the power to regulate commerce is restricted to commerce among the States, and does not extend to intrastate commerce, except where the regulation of intrastate commerce is necessary and proper to the effective

regulation of interstate commerce—which is not shown to be the fact in the Commission's decision in this case.

The Pennsylvania Railroad Company is not questioning any administrative finding of the Commission that a given prejudice or discrimination is undue or unjust. Such a finding of the Commission relates to an administrative question of fact, and is not reviewable in the Courts. The reliance here is on the principle of law that *no* prejudice, preference or discrimination prohibited by the Act can result from the possession, extension or acquisition of trackage facilities to or by one carrier over the tracks of another. As Mr. Commissioner Potter says in his dissenting opinion, "Under the law, as I understand we have construed it, we are not at liberty to make a finding of undue prejudice where certain shippers are served by a carrier by virtue of ownership or trackage and an extension of the carrier's facilities would be required to serve other shippers. *A carrier must use its existing facilities impartially. It is, under no obligation to extend or curtail them except when required under express provisions of the Statute*"* (Transcript, page 26.)

1. The Orders of the Interstate Commerce Commission may be set aside by the Court for Error of Law.

It is well settled that the orders of the Commission may be set aside when they are based upon a mistake of law: I. C. C. *vs.* Union Pacific, 222 U. S. 541, 547 (1912). Thus in Texas & Pacific Railway *vs.* I. C. C., 162 U. S. 197 (1896) the Supreme Court set aside an order of the Commission because that tribunal refused to take into consideration, and give effect to, the competitive conditions surrounding import traffic as distinguished from domestic traffic: in I. C. C. *vs.* Diffenbaugh, 222 U. S. 42 (1911) the Court set aside another order because the Commission had condemned an allowance to a shipper, not because of inherent illegality,

* Italics ours.

but because of supposed collateral consequences (see page 46): so in P. & R. Ry. *vs.* U. S., 240 U. S. 334 (1916) the Court set aside an order of the Commission finding discrimination against Jersey City in the matter of cement rates, because other carriers than the carrier charging the rate complained of had in effect lower rates, the case originating out of the complaint of the shipper charged the higher rate: in I. C. C. *vs.* Stickney, 215 U. S. 98 (1909) the Court condemned an order of the Commission finding a terminal charge unreasonable because the evidence showed that the charge was in itself reasonable and that the Commission has been influenced to hold it otherwise by its views as to the aggregate charges including that for transportation: in Southern Pacific Co. *vs.* I. C. C., 219 U. S. 433 (1911), the Court set aside an order of the Commission reducing rates because the Commission based the order on the theory that the carrier was estopped from charging higher rates under the circumstances of the case.

A. IF THE ERROR OF LAW IS MANIFEST ON THE FACE OF THE COMMISSION'S DECISION IT IS NOT NECESSARY TO BRING BEFORE THE COURT THE EVIDENCE BEFORE THE COMMISSION.

When the Commission's decision involves an error of law patent on the face of the report, it is not necessary to bring before the Court the entire record of the proceedings before the Commission, but the order will be set aside because of the obvious lack of foundation for the Commission's action, which would not be cured by *any* evidence which might have been produced before the Commission.

This was done in the case of the United States *vs.* The Pennsylvania Railroad Company, 242 U. S. 208 (1916), and again in Central Railroad Company of New Jersey *vs.* U. S., 257 U. S. 247 (1921).

The Court's particular attention is directed to this latter case, since it affords strong support for the contentions of the petitioner in the present proceeding.

In a proceeding duly brought before it by complaint, the Commission had found that the defendant railroad companies were guilty of discrimination or undue preference in that they refused to accord to shippers on their own lines a privilege known as creosoting-in-transit, while they were parties to joint rates under which other carriers parties to such rates accorded such privileges to shippers located on their lines. The proceeding challenging the order of the Commission was initiated by a bill in the United States District Court for New Jersey, reciting, as does the bill in the present instance, the pleadings before the Commission and the Commission's decision; and, the District Court having denied an interlocutory injunction, the case was brought by appeal to this Court, where the decision of the District Court was reversed and the order of the Interstate Commerce Commission set aside. This was done because of the error of law manifest on the face of the Commission's decision, and without production or consideration of the evidence before the Commission. It was insistently claimed in that proceeding that findings as to the existence or non-existence of undue prejudice or discrimination were not reviewable in the courts; but this Court, refusing to accede to this proposition, held that, since the Commission's findings involved an error of law as to what constituted undue preference prohibited by the statute, they were reviewable and it therefore was incumbent upon the Court to declare the correct rule on the subject and to set aside the Commission's decision because of the fact that the Commission had not followed the true rule.

It is on the same general ground that the Commission's decision is challenged in the present instance, the petitioner claiming that the Commission has erred in its interpretation of the law, and has held that discrimination or undue preference prohibited by the law results from the mere existence or non-existence of trackage facilities. This, it is submitted, is an error of law which appears on the face of the Commission's report and which requires that it be suspended and set aside.

2. The provisions of the Interstate Commerce Act clearly indicate that a finding of discrimination or undue preference may not be rested upon the fact that certain shippers are served by a carrier by virtue of the ownership of tracks or trackage rights, and that other shippers are not reached by said carrier simply because it does not own tracks or trackage rights which would enable it to reach such other shippers. The granting, withholding or possession of trackage rights between carriers cannot be a basis for a finding of discrimination or undue preference.

In the first paragraph of Section 1 of the Interstate Commerce Act (41 Stat. L. 474), it is provided that, "the provisions of this Act shall apply to common *carriers* engaged in—

(*a*) The transportation of passengers or property wholly *by railroad,* or partly by railroad and partly by water," etc.

In this very first paragraph of the Act, there is a clear line of demarcation drawn between (*a*) the common carrier and (*b*) the property or plant with which it performs its service. Further on in this same Section, in paragraph (3), it is provided that "The term 'railroad' as used in this Act shall include all bridges* * * and also *all the road in use by any common carrier* operating a railroad, whether owned *or operated under a contract, agreement or lease,* and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards and grounds, used or necessary in the transportation or delivery of any such property."

There is here a declaration of what is intended to be included in the term "Railroad" as used in the Act. It is to include "a road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease."

A road over which a common carrier has trackage rights

is clearly " a road in use * * * under a contract," and hence for all purposes of the Act must be regarded and treated as part of the "railroad" of such common carrier.

Hence it follows that that portion of the railroad belonging to the Western Maryland Railway Company over which The Pennsylvania Railroad Company has trackage rights under the agreement between the two Companies providing therefor must be considered as a part of the railroad of the latter Company in the determination of all questions relating to the extent of the obligation, if any, with respect to affording service to shippers incurred by or imposed upon The Pennsylvania Railroad Company by virtue of the use of the trackage rights thus acquired by it.

Accepting this as the correct conclusion, then it would seem inevitably to follow that no warrant or support for the theory or view upon which the Commission has acted in the present case can be found in the Act, for this theory or view is that the failure of The Pennsylvania Railroad Company to extend its trackage rights over the Western Maryland Railway subjects to undue discrimination shippers who, if such an extension were made, would be enabled to utilize directly the facilities of The Pennsylvania Railroad Company. But clearly it would seem that if a failure to extend its trackage rights involves such a result The Pennsylvania Railroad Company would be chargeable with like discrimination because of a failure to extend its own railroad—*reductio ad absurdum.*

Suppose that The Pennsylvania Railroad Company and the Western Maryland Railway Company, instead of entering into the existing arrangement with reference to the use of each other's tracks, had built, in each instance, their own side track connections to the plants of the industries in the so-called trackage zone; this would have given the industries in this locality direct connection with both railroads and would have put them in the same position, as regards other industries in York, as they now occupy under the trackage arrangement. But it will not be pretended that any ground for a finding of undue prejudice would result from such a

situation. However, what has been done is precisely the same in principle. In order to avoid the operating objections which would necessarily arise if numerous side track connections were to be built across the main running tracks of these two railroads, the two companies have acquired such connections by a contract under which they accord each other the use of their tracks respectively; but the mere fact that in the one case the track used by the railroad would be a track owned by it, whereas, under the present arrangement, the track which it uses is owned by another carrier, creates no difference in point of law.

The situation is exactly the same in principle as exists in the case of certain industries which, as shown on Exhibit F (Transcript, page 28), are located in West York Borough between the tracks of the Pennsylvania Railroad and the tracks of the Western Maryland, where these tracks diverge. These industries, *e. g.*, 48, 49 and 50, have side-track connections with both railroads, but their advantage is one of location, and therefore not undue: I. C. C. *vs.* Diffenbaugh, 222 U. S. 42, 46 (1911); Ellis *vs.* I. C. C. 237 U. S. 434, 445 (1915), cited with approval as to this point in U. S. *vs.* Ills. Cent. R. Co., 263 U. S. 515, 524 (1924). Neither is the advantage of the industries located in the so-called trackage zone undue.

The validity of this distinction is confirmed by the decisions of this Court which has upheld the authority of the Interstate Commerce Commission to require a fair distribution of such cars as it owns (B. & O. R. R. *vs.* U. S., 215 U. S. 481-1910; Morrisdale Coal Co. *vs.* P. R. R., 230 U. S. 304-1913; etc.) while at the same time denying the authority of the Commission to require the carrier to obtain and furnish to shippers a special type of car which it did not possess to the extent demanded (U. S. *vs.* P. R. R., 242 U. S. 208-1916).

The Interstate Commerce Act does contain provisions relating to the extension of railroad tracks or the abandonment of existing trackage, but these provisions are entirely separate and distinct from the provisions governing the

carrier in the use of its existing plant, and did not appear in the original act. They have been incorporated therein by later amendment just as, in the State regulation of public utilities, requirements as to extension of plant have appeared later than provisions as to equality of service at reasonable rates.

It was almost twenty years after the passage of the original Act when Congress inserted a provision enabling the Interstate Commerce Commission to require a carrier, under certain circumstances, to accord a switching connection to a shipper offering traffic. This provision was incorporated by the Hepburn Amendment of 1906 (34 Stat. 584), and now appears in the act as paragraph (9) of Section 1. It reads as follows:—

> "Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in

section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money." (34 Stat. 584; 36 Stat. 539.)

Later the Transportation Act, 1920, conferred additional powers upon the Commission with respect to the control of the carriers' line of railroad (41 Stat. 476). By this act what is now paragraph (18) of Section 1 was incorporated in the Interstate Commerce Act. This paragraph reads as follows:—

> "After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Paragraghs (19) and (20) established the procedure to be followed, and these are followed by paragraph (21) whereby the Commission's authority is further enlarged so as to permit it to require the extension of the carriers' line. This paragraph is as follows:—

"The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend to its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Paragraph (22) provides that paragraphs (18) to (21) shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, so that such tracks may be installed or discontinued without the approval or permission of the Commission. In connection with this legislation, reference may properly be made to the decisions of this Court in Eastern Texas R. R. Co. *vs.* U. S., 258 U. S. 204 (1922) and Railroad Commission *vs.* Southern Pacific Co., 264 U. S. 331 (1924), as illustrative of the great advance made by these provisions of the Act.

It is not necessary to discuss at this point the constitutionality of these provisions. Their insertion in the act demonstrates that the other provisions of this legislation were not intended to confer power upon the Commission to control the extent of the carrier's plant, but only to regulate the service rendered by the carrier with its existing plant.

A. THAT THE GENERAL PROVISIONS OF THE INTERSTATE COMMERCE ACT WERE NOT INTENDED TO AUTHORIZE THE COMMISSION TO REGULATE THE EXTENT OF THE CARRIER'S PLANT IS MADE ESPECIALLY CLEAR BY SECTION 3 OF THE INTERSTATE COMMERCE ACT—UNDER WHICH THE COMMISSION'S ORDER IN THIS CASE HAS BEEN ISSUED—AND BY THE HISTORY OF THIS SECTION.

It should be observed that the order of the Commission which is here the subject of contest is based upon Section 3 of the Interstate Commerce Act. The Commission, after having resolved all other issues in favor of the defendant railroad companies, finds that the arrangement between The Pennsylvania Railroad Company and the Western Maryland Railway Company with respect to the use of each other's tracks within the particular zone described in the opinion, while contemporaneously refusing to extend the use of their tracks in other parts of York, creates "undue prejudice and disadvantage."

The Commission has not ordered The Pennsylvania Railroad Company to switch for the Western Maryland Railway Company or the Western Maryland Railway Company to switch for the Pennsylvania. It was asked to require the interchange of traffic at York and reciprocal switching, but it declined to do so. In this connection it said (Transcript, pages 24-25):—

> "We further find that the practice of the Pennsylvania in interchanging traffic with the Maryland & Pennsylvania and switching traffic to and from its junction with that road while contemporaneously refusing to interchange and to switch traffic to and from the Western Maryland at York has not been shown on this record to be unduly prejudicial to the Western Maryland, to shippers and consignees patronizing its routes and to the traffic of such patrons, and is not unduly preferential of the Maryland & Pennsylvania shippers and consignees over that route and their traffic."

But it did undertake to require these two railroad companies, the Pennsylvania and the Western Maryland, to *extend the use of their tracks to each other,* and the basis for this requirement was the fact that they were doing this with respect to the two tracks which run parallel and immediately adjacent to each other in a certain part of the city of York. The Commission's finding in this regard is as follows (Transcript, page 24):—

> "We further find that the practice of the Pennsylvania and the Western Maryland of *extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within the zone hereinbefore described, and of thereby according to shippers within the zone the benefit in service and rates of location upon both lines, while contemporaneously refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located within the city of York, but without the zone, or otherwise to accord to shippers without the zone the benefit of the service and rates of both lines,** is unduly preferential of shippers within the zone, and subjects shippers on their lines without the zone to undue prejudice and disadvantage."

And the Commission's order follows this finding. This order is as follows (Transcript, page 27):—

> "This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and the said Commission having found in said report that the practice of the Pennsyl-

* Italics ours.

vania Railroad Company and the Western Maryland Railway Company *of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within a zone described in the report, while refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located but without the zone, under substantially similar circumstances and conditions, is subjecting various shippers and industries to undue prejudice:**

"IT IS ORDERED, That said defendants be, and they are hereby, notified and required to cease and desist, on or before November 6, 1922, and thereafter to abstain, from practicing the undue prejudice found in said report to exist.

"IT IS FURTHER ORDERED, That said defendants be, and they are hereby, notified and required to establish, on or before November 6, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid undue prejudice found in said report to exist.

"AND IT IS FURTHER ORDERED, That this order shall continue in force until the further order of the Commission."

The language of the Commission, both in its opinion and in its order, indicates beyond contravention that the view of the Commission was that it was incumbent upon The Pennsylvania Railroad Company and the Western Maryland Railroad Company to extend the use of their tracks to each other throughout the city of York if they continued to make use of the limited trackage which they had granted each other in a certain part of the city because such limited trackage constituted a violation of Section 3.

* Italics ours.

Now, Section 3 of the Interstate Commerce Act, as originally incorporated in the Act to Regulate Commerce in 1887 (24 Stat. 379), read as follows:—

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.
>
> "Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This section continued unchanged until the Transportation Act, 1920, which, while allowing the first paragraph of the section to stand unmodified, inserted a second paragraph which relates to the extension of credit by railroads and has no bearing upon the present controversy, and then, in lieu of the original second paragraph, enacted the following, which are designated paragraphs (3) and (4) of Section 3 (41 Stat. 479):—

> "(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers,

afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

It will be observed that what is now paragraph (3) of Section 3 is substantially similar to the former paragraph 2 of Section 3, except that there have been omitted the words "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." It is obvious that the new paragraph (4) of Section 3 is a substitute for the omitted portion of the original paragraph (2) and is designed to give to the Commission—if this can be done constitutionally—a specifically defined power with respect to the use by one carrier of the tracks and terminal facilities of another.

Manifestly, all canons of construction support the principle that, by this grant of power with respect to the use of tracks and terminal facilities, Congress intended to define and limit the Commission's authority in the premises, and this is made the more manifest when it is remembered that the Commission was denied this power under the original Act even in respect to situations in which it might deem the exercise of the power essential to correct discrimination and undue preference. And the language used in paragraph 2 of the original section *defined the interpretation* to be given the other provisions of the section. They were *not to be construed** as requiring one carrier to give the use of its tracks and terminal facilities to another. *The language did not incorporate or create an exception, but declared the construction* which should be put upon the provisions of the section which imposed upon carriers the obligation therein set forth. Consequently these other provisions have never meant that such use of tracks, and terminal facilities can be required, and they do not gain an enlarged meaning because of the omission of the interpretative rule; and especially is this true when such omission is coupled with a provision which defines the circumstances under which, and the extent to which, the use by a carrier of another carrier's tracks and terminal facilities may be secured. By this provision Congress has now

* Compare Hans *vs.* Louisiana, 134 U. S. 1, at page 11 (1889).

undertaken to give the Commission some power in the matter of requiring one railroad to permit another railroad to use its tracks and terminal facilities, and in this very case the Manufacturers' Association of York invoked the exercise of this new power of the Commission (paragraph 11 and paragraph 13, sub-paragraph 2 (*a*), of the complainant's petition before the Commission, Exhibit A, petitioner's bill, Transcript, page 9).

But the Commission specifically finds that there is no basis on which it can exercise this power. It states, in its opinion (Exhibit E to petitioner's bill, Transcript, page 24):—

> "We find that it has not been shown to be in the public interest to require the use of the terminal facilities or main-line tracks of the Pennsylvania at York by the Western Maryland."

And yet, in spite of this finding and of this definite recognition that it is not justified in exercising the power which Congress has sought to confer upon it in paragraph (4) of Section 3, which, as indicated by the new paragraph (4) as well as by the legislative history referred to, was never intended to permit the Commission to require one carrier to accord another the use of its terminal facilities, the Commission attempts to deal with the matter by indirection, and has issued an order in this case requiring The Pennsylvania Railroad Company and the Western Maryland Railway Company to extend to each other the use of their tracks and terminal facilities in York, unless they cancel the mutual trackage privileges which they have heretofore accorded to each other.

This defect in the order cannot be met by the suggestion that the Commission does not require The Pennsylvania Railroad Company and the Western Maryland Railway Company to extend to each other the use of their tracks and terminal facilities; that, on the other hand, it gives them the option of withdrawing from each other the use of such tracks and terminal facilities now permitted.

If the petitioner is right in its contention that the Commission cannot require these roads to extend to each other the use of their tracks and terminal facilities in York, in view of its finding that it has not been shown to be in the public interest to make this requirement, then the Commission is not justified in endeavoring to compel the railroads to withdraw from each other the trackage rights which they have accorded each other in the trackage zone under the compulsion of extending these rights if they do not do so. *This would be to penalize the Pennsylvania for not doing what the Commission has found that it is not in the public interest to do.*

The decisions have recognized a clear line of demarcation between the authority of the Government to prevent discrimination and to require the extension of the carrier's plant. The rule that there shall be no discrimination by a Public Service Corporation is one that has existed for many years, finding its roots in the common law, but the authority of the Government to require a Public Service Corporation to conform the boundaries of its service to the wishes of a community is a very modern development, and one which has been justified only under specific statutory authority, only to a limited extent, and only after the most careful scrutiny as to its constitutional validity.

In this connection reference is made to the decision of the Supreme Court of the United States in New York & Queens Gas Company *vs.* McCall, 245 U. S. 345 (1917) which sustained as against a claim of violation of the Fourteenth Amendment, an order of the Public Service Commission of the State of New York requiring the Gas Company to extend its gas mains and service pipes. The decision of the New York Court of Appeals, 219 N. Y. 84 (1916) says, at page 87, that the Public Service Commission was specifically authorized "to order reasonable improvements and extensions," and that this was the authority under which it undertook to act. Similar authority existed for the order sustained by this Court in the case of Chicago & Northwestern Railway *vs.* Ochs, 249 U. S. 416 (1919), the order sustained

being one of the Railroad & Warehouse Commission of Minnesota requiring the Railroad Company to alter and extend a side track leading from its main line to an adjacent brick and tile manufacturing plant, the apportionment of cost for the extension being deemed by the railroad company arbitrary. Under the Minnesota law (General Statutes, 1913, §§4178, 4231, 4284) the company could be required to construct a side track when the Commission, after a full hearing, had found its construction necessary, and that the part of the expenditures apportioned to the company was reasonable (page 326 of the decision, and see the Minnesota Statute). These are merely illustrations of the fact that, where it is desired to entrust commissions with authority to require an extension of the plant of a public service corporation, such authority is specifically conferred.

Moreover the decision of this Court in Louisville & Nashville Railroad *vs.* U. S., 242 U. S. 60 (1916) fully sustains the contentions of the appellee. In that case shippers located at Nashville had filed a complaint against the railroads serving that city because the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Terminal Company refused to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville on the same terms as interstate non-competitive traffic while interchanging both kinds of said traffic on the same terms with each other. By virtue of an arrangement made by the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway certain of their tracks were operated on their behalf respectively by the Nashville Terminals, and it was contended that they could not refuse to switch for the Tennessee Central when, as was claimed, they were switching for each other. But this Court held that they were not switching for each other. The Court said:—

> "The fact principally relied upon to uphold the order of the Commission is that instead of each road doing its own switching over the terminals used in common they switch jointly, and it is said that therefore each is

doing for the other a service that it cannot refuse to a third. We cannot believe that the rights to their own terminals reserved by the law are to be defeated by such a distinction. We take it that a several use by the roads for this purpose would open no door to a third road. If the title were strictly joint throughout in the two roads, we can see no ground for prejudice in the adoption of the more economical method of a single agency for both, each paying substantially as it would if it did its own work alone. But, as we have indicated, a large part of the terminals is joint property in substance and the whole part of the terminals is joint property in substance and the whole is held and used as one concern. What is done seems to us not reciprocal switching but the use of a joint terminal in the natural and practical way. It is objected that upon this view a way is opened to get beyond the reach of the statute and the Commission. But the very meaning of a line in the law is that right and wrong touch each other and that anyone may get as close to the line as he can if he keeps on the right side. And further, the distinction seems pretty plain between a *bona fide* joint ownership or arrangement so nearly approaching joint ownership as this, and the grant of facilities for the interchange of traffic that should be extended to others on equal terms. The joint outlay of the two roads has produced much more than a switching arrangement, it has produced a common and peculiar interest in the station and tracks even when the latter are not jointly owned. In our opinion the order was not warranted by the law; but in overturning it upon the single point discussed we do so without prejudice to the Commission's making orders to prevent the appellants from discriminating between competitive and noncompetitive goods, so long as they open their doors to the latter, the appellants being entitled to reasonable compensation, taking into account the expense of the terminal that they have built and paid for."

In the case at bar there is no single agency doing the work for each of the Trunk Line carriers. There is nothing more in the situation than the use by The Pennsylvania Railroad Company of a certain portion of the tracks of the Western Maryland Railway and the corresponding use by the Western Maryland Railway of a portion of the tracks of the Pennsylvania. Under the specific provisions of the Interstate Commerce Act, these portions of track become a part of the railroad of the using carrier, and there is no more basis for the finding of discrimination because of the existence of such user than there would be if the extension were made by rails and ties laid and owned in fee simple by the using railroad.

The dissenting Judge in the Court below seems to be fearful that this contention reposes an undue amount of control in the carriers with reference to the extent of the rights that they may give and withhold in cases of this kind. He says (Transcript, page 35):—

> "If true, the two companies may at any time at will restrict its favored locality by confining their trackage agreement over a limited area of a square or even less extent along the favored area or zone, without regard even of those whom by the present arrangement they are obliged to serve without undue prejudice."

But until the amendments of the Interstate Commerce Act, incorporated therein by the Transportation Act, 1920, there has been no Federal restriction upon the right of a carrier to give, withhold or withdraw trackage rights to or from another railroad. Such matters have been regulated, if at all, by State law; and no greater public disadvantage could result from the existence of such power to give, withhold, or withdraw trackage rights than results from the power of a carrier to extend its road or abandon portions thereof, and yet until the Transportation Act, such extensions and abandonments were not subject to the jurisdiction of the Interstate Commerce Commission. Furthermore, the provisions of paragraph (18) of Section 1 of the

Interstate Commerce Act, quoted above at page of this brief, would preclude the carriers from taking any such arbitrary action as is feared by the dissenting Judge, since it prohibits the abandonment of the operation of any portion of a carrier's railroad without the approval of the Commission. And while the action of the Commission in this case, as pointed out by the District Court, constitutes, if sustained, such approval and indeed requirement, the carriers themselves have no such control of the situation as the dissenting opinion assumes.

In their effort to bring this case within the decision of this Court in the Newcastle Switching case, Pennsylvania Company *vs.* United States, 236 U. S. 351 (1915), counsel for the Government and for the Commission suggest that the Commission's order in this case does not "direct that either company shall give the use of its terminals to the other,"* "the carriers may remove the undue prejudice either by interchanging switching on agreed compensation for the shippers outside of the restricted artificial zone or they may extend the zone and their operations therein so as to include those industries,"† that the order "has not made any positive requirement as to interchange, reciprocal switching, common use of terminals, or the establishment of joint rates,"‡ and that "the prejudice may be eliminated by establishing joint rates,"§ etc.

When it is remembered that disobedience of an order of the Interstate Commerce Commission involves liability for a fine of $5,000 and that in case of a continued violation each day constitutes a separate offence, it may well be questioned whether an order indefinite to the extent indicated by these suggestions of counsel can stand against the principle of International Harvester Co. *vs.* Kentucky, 234 U. S. 216 (1914); U. S. *vs.* Cohen Grocery Co., 255 U. S. 81 (1921), etc.

But with these suggestions contrast the language of the order (Transcript, page 27):—

* Brief for the United States, page 15.
† Brief for the United States, pages 16-17.
‡ Brief for the Interstate Commerce Commission, page 30.
§ Brief for the Interstate Commerce Commission, page 31.

* * * "that the practice of the Pennsylvania Railroad Company and the Western Maryland Railway Company of *extending the use of their tracks* to each other *for the purpose of terminal receipt and billing of freight* at industries in York within a zone described in the report, while *refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries* similarly located but without the zone, under substantially similar circumstances and conditions, is subjecting various shippers and industries to undue prejudice.

"It is ordered that the defendants be and they are hereby, notified and required to cease and desist on or before November 6, 1922, and thereafter to abstain from practicing the undue prejudice found in said report to exist."

What possible interpretation can this order be given except that the carriers must either withdraw from each other the use of their tracks in the trackage zone or extend to each other the use of their tracks outside this zone? And since the Commission has found that the latter course "has not been shown to be in the public interest" the only course available is the discontinuance of the present arrangement, as stated by the District Court.

Moreover, joint rates could not be required by the Commission except under the restrictions provided by the Interstate Commerce Act. The quotation from the opinion of this Court in U. S. *vs.* American Railway Express Co., 265 U. S. 425 (1924), at page 33 of the brief of counsel for the Commission is inapposite, since the essential point of that decision was that the Commission was not restricted in establishing through routes and joint rates in the case of express companies to the same extent as it is restricted in the case of railroad companies.

And as to interchange switching it must be remembered that the Commission discussed the Newcastle case and refused to apply it, pointing out the reasons why the Pennsylvania might properly interchange traffic with the Mary-

land & Pennsylvania at York while refusing to interchange there with the Western Maryland (Transcript, pages 20-21), and that it also referred to the fact that joint class rates, as well as certain commodity rates, on the York basis, have already been established by the Pennsylvania and the Western Maryland, between York and points on their respective lines with interchange at Hanover (Transcript, page 20).

Moreover, this Court has held that to require terminal switching is not to require a carrier to give the use of its terminal facilities to another carrier. Thus in L. & N. R. R. Co. *vs.* U. S., 238 U. S. 1, the Court says with respect to the order of the Commission (page 18):—

> "Neither did it order the appellants to give the use of their terminals to the Tennessee Central, but only required them to *render to the latter the same service** that each of the appellants furnishes the other *in switching cars to industries** located in and near the yard."

Obviously, therefore, the giving of the use of its tracks by one railroad to another does not signify terminal switching for such other carrier.

The suggestions of counsel for the Government and for the Commission that the order means something else than its plain language would indicate seems to disclose a recognition of the inherent invalidity of the order as it stands.

At pages 22 and 30 of the brief for the Interstate Commerce Commission reference is made to a decision of the Pennsylvania State Railroad Commission similar in substance to the decision of the Interstate Commerce Commission here in issue: Mfrs. Assn. of York *vs.* Railroads, Report of Pa. State R. R. Comm. for 1909, page 165. But counsel for the Commission fails to refer to the fact stated in the report of the Interstate Commerce Commission that "when the Pennsylvania attempted to comply with that recommendation by withdrawing from the interchange arrangement, it was restrained by order of the

* Italics ours.

United States Circuit Court. The Pennsylvania Commission did not have power to issue a mandatory order, and the method provided for making its recommendation obligatory was not pursued to a conclusion" (Transcript, page 23). Manifestly the Court in that case found nothing illegal in what the State Commission forbade; and the failure of the State authorities to pursue the matter indicates a similar conclusion.

3. In prior decisions the Commission has recognized that a trackage right is the equivalent of an extension of the carrier's own tracks, and that its exercise or non-exercise cannot afford a basis for a finding of unjust discrimination. Its decision in the present case ignores the principle which it has applied in various other cases.

This fact is alluded to by Mr. Commissioner Potter in his dissenting opinion when he says:—

> "We have repeatedly held that where one road serves a community or industry located on the tracks of another under a trackage arrangement, the situation is in effect the same as if it had extended its rails to such community or industry." (Exhibit "E" to petitioner's bill, Transcript, page 25).

As long ago as 1890 the Commission had held that undue discrimination could not result from the existence of a limited trackage privilege: Alford *vs.* Ry. Co., 2 I. C. R. 771 (1890).

In that case the Union Pacific Railroad Company had entered into a contract with the Rock Island Railway Company, by which the latter company acquired trackage rights for its through trains from and to points on its own road over the road of the Union Pacific Company between Kansas City and Topeka, upon condition that no local business should be done by the Rock Island Company on any part of the line used under this agreement.

Upon complaint made against the Rock Island Company by the city of Lawrence, one of the intermediate towns,

the Commission held that the Rock Island Company was not bound to do the local business prohibited by the agreement, saying (page 775):—

> *"The Union Pacific Company is not bound, in the absence of a statute requirement, to grant the use of its road to another company, and in the voluntary grant of a use it may limit the privilege when not otherwise regulated by statute so as to protect itself from injury.** This is all that has been done. A running privilege only over its tracks has been given by the Union Pacific Company to the respondent, but no privileges as a common carrier for traffic originating or terminating on the line used by the respondent between Kansas City and Topeka. It can only be used for through traffic. The local business on that line is the business of the Union Pacific Company. There is no complaint that it does not run sufficient trains to accommodate the public, or that its local service is not entirely adequate. If the respondent ran no trains on that line the local service to the public would be the same. The question therefore of compelling the respondent to perform a local service is apparently an abstract question more than a practical one. It rests on theoretical reasons rather than on grounds of public convenience or necessity. We fail to see that there is any unjust discrimination against the local business on this line, or any undue preference to Topeka or Kansas City for through business.
>
> "The respondent, under existing arrangements, has no authority to do otherwise. The offenses charged against it must be predicated of something done for others under similar conditions that is not done for the complaining party. *There is nothing done for any one located on the line used under the contract that is not done for complainants.** The whole force of complainant's contention is that more facilities would be afforded if respondent rendered the service

* Italics ours.

in question. Conceding this to be true, the respondent explains by showing that it has no power to do so, and this answers the charge. * * *

*"Running arrangements like the one in question, and with like restrictions, exist in many other parts of the country, and are of great service in transportation. In some instances in large cities several companies run their trains over the tracks of one company for through business, but take no local business from the company that gives the privilege. It has never been shown that this practice injures any one, or that it is not in the public interest. It certainly saves large expenditures for parallel lines and for terminal rights in cities. A decision adjudging such arrangements unlawful could only demoralize transportation to a large extent and prove extremely prejudicial to carriers as well as to the public."**

The Alford case is directly in point in connection with the case at bar. In the Alford case certain localities embraced within the territorial scope of the trackage agreement had the resulting benefit from that agreement. Other localities though also situate between the termini of the trackage agreement did not receive any benefit because the Rock Island Company was not permitted (under the agreement) to serve those localities. In other words, as applied to the York situation, it would be just as if the Western Maryland under the trackage arrangement were permitted to serve certain industries located within the territorial boundaries of the trackage arrangements, but was not permitted to serve other industries. Since under the Alford case such an arrangement does not constitute a violation of the Interstate Commerce Act, *a fortiori* an arrangement (such as that at York) is not forbidden by the Interstate Commerce Act, where, though the trackage right is confined to certain territorial limits, it embraces all industries within those limits.

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* Italics ours.

In further substantiation of this principle reference is made to the case of Commercial Club of Superior *vs.* Great Northern Railway Company, 24 I. C. C. 96 (1912). In that case the Commission says, at page 112:—

> "The Milwaukee has its own lines from points of production on its lines to Minneapolis, and, through the trackage agreement referred to, to Duluth-Superior. This trackage agreement is, we think, tantamount to owning its own line to Duluth-Superior."

In the case of Dixie Cotton Oil Company *vs.* St. Louis, etc., Railway, 27 I. C. C. 295 (1913) a complaint of discrimination was made against certain railroads because a charge of $3.00 per car for switching charges for freight was assessed between the plant of the complainant and the junction of the St. Louis, Iron Mountain & Southern Railway while no charge for a similar service was made to and from a plant of another company located at the same place. It appeared that the plant of this other company was reached by the St. Louis, Iron Mountain & Southern by virtue of the right which it had acquired to use the track of the Cotton Belt Railroad and the Commission denied that this situation created a violation of the Act, holding (297): —

> "It is not contended by complainant that, if the rails of the Iron Mountain and Cotton Belt actually reached the Buckeye plant, it would be subjected to discrimination by the imposition of switching charges on shipments to it from noncompetitive Iron Mountain points. It is the general custom of all carriers by rail to haul freight from points on their respective lines to industries located on their own sidings without the imposition of switching charges. It is a well recognized practice among carriers to agree as to trackage rights and privileges between one another for the common use of a part of the line of one in such a manner as to make the tracks subject to the agreement a part of both roads. In pursuance of the general practice the Cotton Belt

and Iron Mountain have made such an arrangement respecting the spur track which runs to the Buckeye and fertilizer plants. The Iron Mountain built the spur and needed the use of Cotton Belt tracks in order to reach it economically; the Cotton Belt needed the spur in order to reach the industries. The effect of the trackage agreement is to put the Buckeye plant on the lines of each carrier. There does not appear to be anything unreasonable or unjust in such an arrangement, or, so far as the record indicates in the practices which have resulted from it. The free switching service rendered by both defendants to the Buckeye plant under the circumstances shown does not, in our opinion, constitute undue prejudice to complainant within the meaning of the act."

Again in Penick & Ford *vs.* Director General, 61 I. C. C. 137 (1921) three railroads served the plant of the complainants through the agency of a terminal company (175):—

"The defendants contend that in switching traffic of either of the trunk lines to and from complainant's plant, the terminal company acts merely as agent for such trunk line, and that it is as if the rails of each of the three carriers referred to separately and actually reached complainant's plant."

The Commission held, with respect to this contention (176):—

"With respect to the period covered by the complaint prior to federal control we conclude that the situation at complainant's plant was the same as if the rails of the three carriers mentioned separately reached the plant and that each of the carriers was within its rights in applying its separately established demurrage rules in connection with the traffic which it handled, and that it was not unlawful to require the execution of separate average agreements."

Again in the case of the Ridge Coal Mining Company *vs.* Missouri Pacific Railroad Company, *et al.*, 62 I. C. C. 259, (1921), the Commission holds that discrimination may not be predicated of the fact that one coal mine is served by two railroads, one of which owns the tracks and the other of which has trackage rights thereover, when another mine is served by but one railroad. The principle is stated clearly and succinctly on page 261, as follows:—

> "If mines of complainant's competitors now reached by the Burlington under trackage agreement were served directly by its rails, it could not be maintained that complainant would be unduly prejudiced because of the advantages accruing to its competitors due to service of their mines by more than one railroad, and the complainant does not so contend. It is our view that the service of such mines by the Burlington under trackage agreements is, in practical and legal effect, the substantial equivalent of the extension of its rails to them."

To the same effect is the case of Dering Mines Company *vs.* Director General, 62 I. C. C. 265 (1921), where, with respect to a somewhat similar situation, the Commission says, page 267:—

> "This case, in so far as the question of joint service is concerned, is controlled by the principles announced in Ridge Coal Mining Co. *vs.* M. P. R. R. Co., 62 I. C. C. 259. We there found, in substance, that the service of a mine by a carrier under trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine; that a mine which is accorded a joint status by means of a trackage agreement is in the same category as a junction-point mine; and that, generally speaking, a carrier is not chargeable with undue prejudice because it extends its service to certain mines, either by extensions of its rails or under trackage agreements, thereby giving

them the advantages of a joint or junction-point status, while declining to make other extensions or trackage agreements to extend its service to other mines. We recognized that there might be certain exceptions to these general principles, but no exceptional circumstances are here presented."

Also in accord with these decisions is Hillsboro Coal Co. *vs.* C. C. C. & St. L. Ry. Co., 63 I. C. C. 401 (1921).

The exceptional conditions referred to are stated on page 262 of the opinion in the Ridge Coal Mining case, and involve the situation where a mine would be located along the track covered by the trackage agreement intermediate to the mine served. In such a case, however, the mine, by virtue of the railroad's trackage agreement, would be, in substance, located on its tracks, and therefore come within the principle on which the petitioner relies.

Finally, even since the Commission's decision in this case it has again reiterated its well established views of the law in an opinion filed after a reargument of the Hillsboro Coal case, *supra.* In its recent opinion (81 I. C. C. 216-1923) the Commission in a unanimous opinion says:—

"On reargument, complainant contends that we erred in failing to find that undue prejudice existed and to order its removal. It is urged that as the service performed in switching cars between the assembly yard and the mines on the joint track at Hillsboro do not differ materially from those performed in the handling of cars to and from complainant's mine, there is presented a situation whereby one of three mines similarly located is accorded different treatment through the operation of the trackage agreement referred to. There is, however, this important distinction. Complainant's mine is located on the old main line of the Big Four extending from Hillsboro through East Alton to Mitchell, Ill., to which the Eastern Illinois has no right of access, and there is no resulting obligation on the East-

ern Illinois to serve complainant's mine. The other two mines at Hillsboro are located on the joint track between Pana and East St. Louis, and under the trackage agreement each carrier has the right to serve each mine. Complainant further contends that our decision in York Mfrs. Asso. *vs.* P. R. R. Co., 73 I. C. C., 40, covers the exact situation here presented. In that case, however, the agreement considered was one providing for the interchange of traffic, and not a trackage agreement. Our order was enjoined by the United States District Court for the Middle District of Pennsylvania, and is now before the Supreme Court of the United States on appeal from that decision."*

In the present case the Commission seeks to distinguish its prior decisions by the statement (Transcript, page 20):—

> "The *agreement*† here provides for the interchange of traffic, and is not a trackage agreement."

But it is obvious that the *agreement* is of no moment. Except to the extent to which it is acted upon, no possible advantage or disadvantage could accrue to any shippers or receivers of freight in York. As the Commission itself has found (Transcript, page 15):—

> "The Pennsylvania and Western Maryland do not interchange at York carload traffic destined to or originating within that city, but interchange such traffic at Hanover, Pa., about 19.5 miles from York, and at other connecting points."

Furthermore, the Commission finds (Transcript, page 17) that the method provided in the contract was not followed out. Finally, *the basis of the Commission's order,*

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* See also Tacoma Traffic &c. Bureau *vs.* N. P. Ry. Co., 87 I. C. C. 507 (1924), at pages 512-513.

† Italics ours.

as appears above, is *not what was agreed to be done,* but *the fact that* the Pennsylvania and the Western Maryland had *extended the use of their tracks to each other,* in a certain part of York, etc., while contemporaneously refusing to extend the use of other tracks, etc., was unduly preferential, etc.* In other words, it was what was being done in the granting and receiving of limited trackage rights that constituted the basis of the Commission's order.

It is respectfully submitted that the dissenting Judge in the court below misconstrued the facts. In his opinion he says (Transcript, page 35):—

> "The two roads, P. and W. M. unquestionably interchange traffic with each other, and without distinction between competitive and non-competitive traffic."

This is directly contrary to the finding of the Commission and to the facts as stated in the opinion of the Commission, and it was evidently this misapprehension of the true situation that led to his dissent, since he concedes that the proposition is generally sound, that the extension of trackage facilities, either by trackage agreement or otherwise, does not support the charge of undue prejudice.

And *the basis* of the Commission's order, as already pointed out is the fact that the two railroads *are extending to each other the use of their tracks in a certain part of the City of York* and not in other parts thereof. It is not based on any unexecuted *agreement.*

It is obvious that a shipper cannot be subjected to undue preference or discrimination by a carrier merely because that carrier enters into an agreement with another carrier. Undue preference, if it exists at all, *must result from action taken* by the carrier. Its agreements with another carrier, unless acted on, are of no significance so far as shippers are concerned. It is the action taken that matters.

Furthermore, the true significance and meaning of the

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* *V. supra,* pages 21-22.

contract is primarily to be determined by the interpretation which the parties themselves have placed upon it by their action. Thus this Court has said (Trust Company *vs.* Omaha, 230 U. S. 100-1913, at page 118):—

> "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."

And in United States *vs.* Biwabik Mining Co., 247 U. S. 116 (1918) this Court quotes with approval, at page 121, the principle:—

> "Show me what men have done under a contract and I will tell you what it means."

It is therefore manifest that in the case at bar the Commission, without indicating any sufficient reason therefor, has departed from all of its prior rulings in regard to the principle involved in this case; and here again the proceeding is like the Creosoting case, *supra,* since in that case, as here, the Commission ignored the principle of law which it had previously followed and which subsequently was held to be the correct principle.

These decisions are referred to because of the rule that the views of a Government commission or official charged with the enforcement of a statute are entitled to special weight with respect to its proper interpretation: New Haven, etc., Railroad *vs.* Interstate Commerce Commission, 200 U. S., 361, at page 401 (1906); Logan *vs.* Davis, 233 U. S., 613, at page 627 (1914); National Lead Company *vs.* U. S., 252 U. S., 140 (1920), at pages 145 and 146. This consideration is especially persuasive in this case because of the facts, that the Commission's interpretation extended over a substantial period, and that, although the Interstate Commerce Act was amended in the interval, it was not so

amended as to change the provisions of the law in this regard: Lewis's Sutherland on Statutory Construction, 2 Ed., Vol. 2, Sec. 403 (page 780); Sessions *vs.* Romadka, 145 U. S., 29, 42 (1892); Logan *vs.* United States, 144 U. S., 263, 303 (1892).

4. The Commission's order cannot be justified on the ground that it relates to a "practice" of the railroads.

It is possible that the Commission may undertake, as it did in the Tank Car Cases, to justify its order on the ground that it relates to a "practice" of the railroads, a possibility which is suggested by the incorporation in the order of the finding that "the 'practice' of The Pennsylvania Railroad Company and the Western Maryland Railway Company of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within a zone described in the report, while refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located or without the zone under substantially similar circumstances and conditions is subjecting various shippers and industries to undue prejudice."

But the use of the word "practice" in this connection is not justified under the Act, and constitutes the same kind of effort to find a basis for an unauthorized order which was made in the Tank Car Cases: U. S. *vs.* P. R. R., 242 U. S. 208 (1916).

In those cases the Commission contended that the fact that The Pennsylvania Railroad Company furnished some tank cars constituted a "practice" and that consequently the Commission could require the company to provide tank cars sufficient to meet the reasonable demands of all shippers. However, the order which it entered was set aside by this Court in the case referred to.

There is no "practice" of the carriers involved in the present proceeding. By virtue of the contract of 1893,

they have accorded each other certain trackage privileges, and, on the basis of these privileges, they are able to operate in a way which would not otherwise be possible, since these privileges permit them to use each other's tracks, but there are no current repeated acts of these companies. These rights were created in 1893, and still subsist, constituting a character of property rights which the Commission has no authority to destroy. And the trackage rights under the decisions of the Commission are merely the equivalent of tracks.

Otherwise it would follow that, even prior to the recent amendments, the Commission might have found that it constituted a "practice" for a carrier to maintain tracks in one part of a city and not to maintain them in another, and might consequently have ordered the carrier to build tracks in the latter part of the city, or, in the alternative, either to build such tracks or to withdraw the tracks in the part of the city where it had already located. No such exercise of authority was ever attempted, nor would it have been sustained by the courts. The more recent provisions incorporated in the Act indicate clearly that, when Congress desires to give the Commission authority with respect to the physical plant of the carrier, it does so in express terms.

It will be readily manifest that, if the existence or non-existence of trackage rights could be designated a "practice" and thereby brought within the authority of the Commission, the existence or non-existence of tracks could be similarly dealt with, and if this were true as to tracks, it would be true also as to the stations and other facilities of the carrier. The Commission might say that it constituted an unreasonable practice to maintain a large station at one point and not to build a similar station at another point. There would be no limit to the things the Commission might do if there were any basis for such an interpretation of the word.

That this is not fanciful is disclosed by the language of this Court in the Tank Car Cases and, in view of the au-

thoritative interpretation of the word there found, it seems proper to quote somewhat at length from that opinion (pages 227-230):—

> "There was amendment in 1910, not of §1 in any particular relevant to our discussion, but of §§13 and 15. It was said by the committee which reported them for consideration that under §15 as it then stood the authority of the Commission to enter an order was 'confined to the subject-matter of rates for transportation and regulations or practices "affecting such rates" and the establishment of through routes where "no reasonable or satisfactory through route exists."' And the committee added that as recommended to be amended §15 'will have its scope largely increased and the jurisdiction of the Commission will be much enlarged;' and that by the amendment the Commission is given jurisdiction to enter orders not only regarding rates but regarding classifications, regulations, or practices, whether they affect rates or not, and make orders requiring conformity thereto.
>
> "'Practices' were not otherwise or precisely defined either in the report or in the amendment recommended and as finally passed. Regarding only its broad generality anything may be asserted of it; regarding its context and the conditions which existed an immediate limitation of it is indicated, made necessary, as we shall presently show.
>
> "Section 15 provides that whenever after full hearing as provided by §13 the Commission should be of opinion that any individual or joint rates collected by a common carrier or 'that any individual or joint classifications, regulations, or *practices* whatsoever of such carrier or carriers subject to the provisions' of the act are 'unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the

provisions of' the act, the Commission is authorized and empowered to determine and prescribe what shall be the just and reasonable rate or rates and 'what individual or joint classification, regulation, or *practice* is just, fair, and reasonable,' and make an order that the carrier shall cease and desist from the charging of excessive rates and shall adopt the classification and conform to and observe the regulation or practice prescribed; the order to continue such time not exceeding two years as shall be prescribed by the Commission.

"Applying the section, it is contended that the neglect to provide or certainly the refusal to furnish tank cars is a 'practice' and became especially so by the reply made by the railroad to the request to furnish them.

"Let us test the contention and see where it takes us. The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a 'practice' within the meaning of §15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as 'practice.' Following a well known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one. These have illustrations in decision of the Commission. And this was purpose enough, remedied all that was deemed evil in privately owned cars of any type. Beyond that it was not necessary to go; beyond that there were serious impediments to going; and we cannot but believe that if beyond that it was intended to go there would have been explicit declaration of the intent, with such provision as to notice and time

> and preparation as its consequences would demand—not ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency, a construction that could be disputed and was disputed.
>
> "Three commissioners out of seven dissented, they declaring that if the act conferred power upon the Commission to order a carrier to enlarge its complement of cars it would follow that the Commission had also the power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches."

As will be observed, the last paragraph of this quotation indicates that the Court saw that the Commission might undertake to extend the interpretation of the word "practice" so as to cover terminal facilities, and the extension of tracks or branches, the very thing which the Commission undertakes to do in this case by requiring, in the alternative, either that the railroads shall extend their trackage rights by concession to each other, or, which is, in substance, the same thing, shall withdraw these trackage rights, and thereby limit their facilities.

5. The Commission's order is invalid as arbitrary and as violating the Fifth Amendment, which prohibits the taking of property without due process of law.

If the petitioner is right in the contentions which it has presented, it clearly follows that the action of the Commission in entering the order which is here the subject of discussion constitutes an arbitrary exercise of power, and would consequently offend against the provisions of the Fifth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law.

6. The Order of the Commission is Invalid in that it is not limited to Interstate Commerce.

It will hardly be denied that the Commission's jurisdiction does not extend to intrastate commerce, except in those cases where, for the effective regulation of such commerce, it is necessary that it shall deal also with intrastate commerce; but in this instance there is no such reason for extending its order to embrace all of the shipments which may originate or terminate in the limited area of York designated, for convenience, the trackage zone. Its order affects as well intrastate shipments as interstate shipments, and is so drafted as to be inclusive of both. Acts of Congress containing similar general language have been held unconstitutional as too inclusive (United States *vs.* Reese, 92 U. S. 214, 220-221-1875; Trade Mark Cases, 100 U. S. 82, 98-1880; Employers' Liability Cases, 207 U. S. 465, 500-501-1908), and the Commission's order is likewise defective in this respect. In general, in the formulation of its orders, the Commission, by express provision, restricts them to interstate commerce, and it is not believed that, in the present instance, the failure to do this was the result of inadvertence. If the intention of the Commission was to omit intrastate commerce from the scope of its order, the order should have been or should be amended accordingly; but, if, on the other hand, the intention of the Commission is that it should apply to intrastate commerce, as it now reads, it is clearly beyond the scope of the Commission's authority and must be set aside.

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